

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of  
Trademark Reg. No.: 2,799,507  
For the mark: MEYER VINEYARD  
Registered: December 23, 2003

**MEIER'S WINE CELLARS, INC.,**

Petitioner,

v.

**MEYER INTELLECTUAL PROPERTIES  
LIMITED,**

Registrant.

# 76456 360  
Cancellation No. 92044883

**REGISTRANT'S RESPONSE  
TO MOTION FOR SUMMARY JUDGMENT**

Registrant, Meyer Intellectual Properties, Ltd. ("MEYER"), owner of the "MEYER VINEYARD" trademark, hereby responds to the Motion for Summary Judgment filed by Petitioner, Meier's Wine Cellars, Inc. ("MEIER'S"), owner of the "MEIER'S WINE CELLARS" mark, and states:

**INTRODUCTION**

Petitioner argues that the sole issue before the Board is the likelihood of confusion created by Registrant's use of the MEYER VINEYARD mark and asks the Board to reach such conclusion as a matter of law (Motion, at 5). However, in July 2004 when Petitioner sought registration of the MEIER'S trademark, it represented to the Examining Attorney that there is no likelihood of confusion between the MEIER'S mark and MEYER VINEYARD mark. Petitioner stated:



06-04-2007

Applicant asserts that there [1] *is no likelihood of confusion* between MEIER'S for the goods stated in the application and MEYER VINEYARD. The cited MEYER VINEYARD mark [2] *gives the impression that the wine is produced from grapes from a particular vineyard*. [3] Applicant's mark on the other hand *gives no such impression* of familiarity with the owner of the mark. . .

(See Registrant's Request to Remove from Suspension, Exhibit A p. 2) (Emphasis and [bracketed numbering] added).

Petitioner's three statements are admissions against interest. *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 599 (1982), *aff'd*, 706 F.2d 1213 (Fed. Cir. 1983) (" . . . such statements constitute admissions and may be considered as evidence, albeit not conclusive evidence, of the truth of the assertions therein"). Moreover, such admission is a stake in the heart of Petitioner's present argument.

Notwithstanding such admissions, which are presently on file in the records of the PTO, Petitioner now makes an inconsistent argument in its pursuit of summary judgment that there is a likelihood of confusion between the above marks, and asks the Board to accept precisely the opposite proposition. Moreover, Petitioner's additional representations to the Examining Attorney that the "MEYER VINEYARD mark gives the impression that the wine is produced from grapes of a particular vineyard," but that Applicant's [Petitioner's] mark "*gives no such impression*" are two additional significant admissions against interest that accurately portray a significant distinction between the two marks, and highlight the lack of any likelihood of confusion. (*Id.*). Petitioner's present attempt to ignore the above admissions to the PTO in its desire to cancel the MEYER VINEYARD registration, and to obtain its own registration, is disingenuous.

Another point is significant in Petitioner's motion. While Petitioner argues that it is seeking registration of the MEIER'S mark alone, Petitioner nevertheless has attached substantial evidence that it is, and has been for a long period of time, marketing wines under the "MEIER'S WINE CELLARS" name and label, according to many of the exhibits submitted by Petitioner in support of its present motion. As demonstrated herein, and confirmed by Petitioner to the Examining Attorney, the two marks: MEIER'S WINE CELLARS, and MEYER VINEYARD, are vastly different in sight, sound and commercial meaning.

Moreover, Petitioner's admission, *albeit* a legal conclusion, that there "is no likelihood of confusion" between the two marks is consistent with a consumer survey commissioned by Registrant that was taken last year in four geographical locations in this country, including Ohio, Petitioner's home state. The survey concluded with empirical data that there is no likelihood of confusion between the two marks because consumers simply do not associate the MEYER VINEYARD label with goods sold under the MEIER'S, or the MEIER'S WINE CELLARS marks. Petitioner therefore cannot meet its burden of proof by a preponderance of evidence to obtain summary judgment as a matter of law, as demonstrated below.

Finally, Petitioner has no priority over the MEYER VINEYARD mark. It has never used that mark nor claimed any ownership of it.

## **ARGUMENT**

### **I. THE PARTIES MARKS ARE NOT CONFUSINGLY SIMILAR**

Contrary to the arguments now made in Petitioner's motion, the parties' marks are not identical, nor even confusingly similar. They look and sound significantly different – MEYER VINEYARD v. MEIER'S WINE CELLARS -- both marks create different commercial images. Further, the stylizations of the parties' marks on the products themselves are strikingly different,

as the products themselves demonstrate. The marks also have different connotations. Petitioner's mark refers to an indoor basement wine cellar, while Respondent's mark refers to outdoor Vineyards. These factors militate against any likelihood of confusion between the two distinctly dissimilar marks as demonstrated below.

A. **Petitioner's Mark.** Petitioner has historically used the MEIER's surname in conjunction with the words "Wine Cellars" on the labels identifying its products as represented by Petitioner's Chairman Robert Manchick (See, par. 3, and Exhibit A to Manchick Declaration). Significantly, Petitioner also states that it is "currently" using the MEIER'S WINE CELLAR'S mark on labels identifying its products. . . "labels that are currently in use" (*Id.*, par. 3). A representative sample of such labels is attached hereto as **Exhibit B.** In addition, Petitioner has historically used the MEIER'S WINE CELLARS trade name as a "Producer of Wines" since at least 1968 (See, Trade Name Renewal Certificates, **Group Exhibit C.** Moreover, in 1987, 1997, 2001, 2002, and 2003 Petitioner's bottle labels displayed the MEIER'S WINE CELLARS trade name (See, **Group Exhibit D.**).<sup>1</sup>

These facts belie Petitioner's arguments that its bottle labels identify "MEIER'S" alone as the source of Petitioner's goods. As a result, purchasers have associated and will associate Petitioner's wines with its trade name: MEIER'S WINE CELLARS. In this light, while the word MEIER'S is in script, and "Wine Cellars" in block letters on the labels, the apostrophe in MEIER'S is a possessive, thereby referring to the source of the product being Wine Cellars owned and operated by MEIER'S, i.e., MEIER'S WINE CELLARS.

The powerful impression created by the words "WINE CELLARS" overshadows the word "MEIER'S" so that the focus is not on "MEIER'S" alone, instead, the focus becomes

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<sup>1</sup> **Exhibit B,** and **Group Exhibits C and D** were produced by Petitioner during discovery in the present proceedings. They are Bates stamped with the prefix "PMTZ".

MEIER'S WINE CELLARS. It is proper for the Board to conduct such analysis. *Cunningham v. Laser Golf*, 222 F. 3d 943, 947, 55 USPQ 2d 1842, 1845 (Fed. Cir. 2000) ("Court may examine each component of the mark ... and the effect of that component on the issue of likelihood of confusion as between the respective marks in their entireties"). The meaning of the entire MEIER'S WINE CELLARS mark, and the commercial impression created thereby, conjures images of a basement that is dark and cool containing wine bottles or barrels, in stark contrast to the image created by Registrant's mark.

**B. Registrant's Mark.** Registrant's mark, "MEYER VINEYARD" on the other hand, creates an entirely different "outdoor" feeling and impression that creates images of outdoor rows of grapevines, daylight, and warmth which suggests a totally different meaning and impression than the dark, cool wine cellar associated with Petitioner's mark. In this regard, it is significant that Petitioner *itself* agrees with the meaning and impression of Registrant's "MEYER VINEYARD" mark. As mentioned, Petitioner previously admitted that "*the cited MEYER VINEYARD mark gives the impression that the wine is produced from grapes from a particular vineyard*" (**Exhibit A**, p. 5). While the sound of MEIER'S alone, and MEYER alone, is somewhat similar, when the entire names on the labels as used in commerce by the parties are viewed and contrasted – MEIER'S WINE CELLARS, versus MEYER VINEYARD, the differences in sounds are immediately highlighted.<sup>2</sup> Moreover, the sight of the two marks are also different: one has two words, the other has three words. The impression created by the word "VINEYARD" overshadows the word "MEYER" so that the focus is not on "MEYER" alone, instead, the entire mark is viewed as MEYER VINEYARD.

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<sup>2</sup> (Registrant's mark disclaims the word "VINEYARD", however, such disclaimer does not reduce the present analysis to only comparing "MEIER'S" and "MEYER". See, *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F. 2d 1565, 1570 (Fed. Cir. 1983) ("...it is well settled that the disclaimed material still forms a part of the mark and cannot be ignored in determining likelihood of confusion. . . Therefore, the disclaimed portions of the mark must be considered in determining the likelihood of confusion").

C. **Presentation and Use of Marks.** Both parties display their marks on their goods. However, the manner of display is vastly different and supports the sight, sound and meaning distinction between the two marks. Registrant's mark is visibly distinguishable from Petitioner's mark through different labeling. *Henri's Food Products Co. v. Kraft, Inc.*, 717 F. 2<sup>d</sup> 352, 355, 220 USPQ 386, (7<sup>th</sup> Cir. 1983). ("Comparison of labels rather than simply the trademarks is appropriate in likelihood of confusion analysis", MIRACLE WHIP and YOGOWHIP). In the present case, Registrant's initial labels for its 2002–2003 vintage Cabernet Sauvignon pictorially emphasized the "Meyer Vineyard" outdoor theme (See, Karen Dismuke Declaration, **Exhibit E**, par. 4). *Also see, Plus Products v. Plus Discount Foods, Inc.*, 722 F. 2d 999, 1007, 222 USPQ 373, 379 (2d Cir. 1983) (In assessing the similarity of two marks, the court should view the marks in the context of the products' packaging).

Registrant's all black bottle is stylishly sleek and displays the name "MEYER VINEYARD" silk screened over the glass face of the bottle in gold block letters. It also displays a block "M" that is overlaid with a scrolled "V". These letters reinforce MEYER VINEYARD and are placed inside a 1 1/4-inch diameter circle. The words "Napa Valley" in gold block letters are also prominently silk screened on the bottle. (See **Exhibit E**, par 5). The silk screened words and 1 1/4 inch circle function as a label, thereby creating unique upscale packaging. This packaging is in contrast to the usual paper labels customarily used by wine producers on their bottles. In this regard, Petitioner's MEIER'S WINE CELLARS mark is also displayed on a paper label that shows "MEIER'S" in a scroll typeface in conjunction with the words "WINE CELLARS" in block letters (**Exhibit B**), or on some occasions "MEIER'S" alone.

Conversely, Registrant never uses the "MEYER" name alone. Instead, Registrant always uses it in conjunction with "VINEYARD" so that the consumer always sees "MEYER

VINEYARD" on Registrant's goods. (Dean Krause Declaration, **Exhibit F**, par. 6). See, *Universal Money Centers v. American Telephone & Telegraph Co.*, 22 F.3d 1527, 1531 (10<sup>th</sup> Cir. 1994) ( AT&T UNIVERSAL CARD and UNIVERSAL MONEY: Appearance of marks dissimilar, convey different ideas, and stimulate different mental reaction despite dominant word "UNIVERSAL"). Also see, *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 116, 223 USPQ 1000, 1002 (2d Cir. 1984) (No confusion found, KING KONG vs. DONKEY KONG video games: Court may grant summary judgment for defendant if visual comparison of marks by court reveals they are not substantially similar).

**D. The "MEIER'S WINE CELLARS" Mark Loses Any First Word Dominance.**

Petitioner argues that MEIER'S is the dominant word in the MEIER'S WINE CELLARS mark. (Motion, p. 9). However, use of similar dominant words such as MEIER'S and MEYER in the parties' respective trademarks "does not always mean that the two overall marks are similar. . . . We must look to the overall impression created by the marks". *Luigino's, Inc. v. Stouffer Corp.*, 170 F. 3d 827, 50 USPQ 2<sup>nd</sup> 1047 (8<sup>th</sup> Cir. 1999). Indeed, this principle also applies when the two dominant words are "identical" (*Id.*). See, *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (Finding no confusion because CRISTAL CHAMPAGNE suggests a clarity of wine or glass bottle, while CRYSTAL CREEK suggests "a very clear and ... remote ... creek or stream"); *Nabisco Brands, Inc. v. Quaker Oats Co.*, 547 F. Supp. 692, 216 USPQ 770 (D.N.J. 1982) (No confusion because "CREAM OF WHEAT" v. "CREAMY WHEAT" – use of the word "Creamy" in a descriptive sense to denote soft and smooth product negates first word dominance).

The surname "MEIER'S" is also a descriptive mark and, when used in conjunction with "Wine Cellars," loses any first word dominance because of the strong meaning and impression

created by addition of the words "Wine Cellars." As mentioned above, the image of a dark, cool basement containing wine bottles or barrels becomes the immediate commercial impression. When contrasted with the MEYER VINEYARD trademark, there is a great dissimilarity and therefore little chance of confusion between the two marks. Therefore, looking at the marks as a whole, their substantial differences outweigh any similarities. "The evidence must be viewed in a light most favorable to the non-movant and all justified inferences are to be drawn in its favor." *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 767, 25 USPQ 2d 2027 (Fed. Cir. 1993).

## **II. THE DISSIMILARITY OF MARKS FACTOR ALONE, UNDER THE *DuPONT* ANALYSIS, IS SUFFICIENT TO FIND THERE IS NO LIKELIHOOD OF CONFUSION**

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This Board has held in an opposition proceeding context that the "dissimilarity of marks" *DuPont* factor, can be dispositive of the entire likelihood of confusion analysis. In *Champagne Louis Roderer*, the Board concluded, and the Federal Circuit affirmed, that the CRISTAL CHAMPAGNE and CRYSTAL CREEK marks were dissimilar in "appearance, sound, significance, and commercial impression as the dispositive *DuPont* factor," and that "this dissimilarity alone precluded any reasonable likelihood of confusion. 148 F.3d at 1375.

Although the Board agreed with the Opposer on three of the *DuPont* factors in that case, *i.e.*, same goods (wine including champagne); same channels of trade; and same or similar customers; it dismissed the opposition proceedings based solely upon the different commercial impressions created by the marks (*Id.*). The Board further found that the CRISTAL and CRYSTAL CREEK marks "evoked very different images in the minds of relevant consumers." (*Id.*)

Similarly, in the present case, the impressions created between the MEYER VINEYARD and MEIER'S WINE CELLARS marks also evoke very different images in the minds of relevant



consumers as stated above. On this factor alone, the Board can deny Petitioner's motion for summary judgment. See, *Kellogg Co. v. Pack'em Enters*, 951 F. 2d 330, 332-333, 21 USPQ 2d 1142, 1144-45 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive" since "substantial and undisputed differences" between two competing marks justified a conclusion of no likelihood of confusion on summary judgment). The Board may therefore find no likelihood of confusion as a matter of law. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F. 2d 1565, 1569, (Fed. Cir. 1983) ("the issue of likelihood of confusion is the ultimate conclusion of law to be decided by the court").

### **III. SURVEY EVIDENCE DISCLOSES NO LIKELIHOOD OF CONFUSION BETWEEN THE TWO MARKS**

Should the Board conclude that the distinctly different marks preclude any likelihood of confusion, as found in the *Champagne Louise Roderer* case, such conclusion is supported by a consumer "confusion" survey conducted on behalf of Registrant. Although Petitioner argues that use of the MEYER VINEYARD mark on wine creates a likelihood of confusion with MEIER'S WINE CELLARS mark on identical goods, that bold, unsupported, and unsupportable argument overreaches. In this regard, Registrant commissioned a survey analyzing consumer reaction to the MEYER VINEYARD mark, and any possible relationship of that mark to MEIER'S WINE CELLARS, or any other entity.

A mall intercept survey was conducted by FTI Consulting, Inc., a nationwide consulting and market research group, during the months of July and August, 2006 in four geographically disbursed cities: Los Angeles; Washington, DC -Metro; Austin, Texas; and Cleveland, Ohio. Personal, face-to-face interviews were conducted with a total of 340 men and women by independent professional marketing research firms with permanent office facilities in the malls.

(Craig Joseph Declaration, Exhibit G, par. 3). A qualified respondent for the study was defined as a person over 21 years of age who had purchased a bottle of wine in the previous six months. Each respondent was taken into a room and shown a bottle of Petitioner's MEYER VINEYARD wine for 30 seconds and, after the bottle was covered, asked several "open ended" questions which sought answers in respondent's own words (*Id.*, par 5).

In the first question, each respondent was asked to "describe what you saw." The survey showed that 35.5% mentioned "Meyer", 68.2% mentioned "black or dark bottle", and 39.1% mentioned "gold lettering." (*Id.*, par. 6). Each respondent was then asked "Who do you think puts out this wine you just saw?" The survey showed that 48.2% said "Meyer," 11.8% answered "Napa Valley," and 30% said they "don't know". No respondent answered that Meier's or Meier's Wine Cellars was a source of the wine, even in Petitioner's home state, Ohio. (*Id.*).

To measure any possible association between MEYER and MEIER'S, each respondent was then asked whether he/she thought the company that puts out the wine bottle they saw also puts out other wines, or other products. The survey showed that 68.7% answered "Yes." (*Id.* par. 7). As a follow up question to those respondents who answered "Yes," each was asked "What other products?" The study further showed that of those who answered, 25 respondents, or 7.4%, said "Wine Coolers," "Sangria," and "Fruit Juices." These respondents were deemed by the study to have "indirectly" referred to Petitioner, Meier's Wine Cellars, Inc. because it also sells similar products. (*Id.*). With respect to the three types of possible confusion sought to be measured, the survey found (i) a zero "direct source" confusion with Meier's, (ii) a 7.4% "indirect source" confusion with Meier's, and (iii) zero "association confusion" with Meier's. (*Id.*).

The survey report concluded that the "maximum" rate of confusion of all types using reasonable assumptions was 7.4% with a plus or minus error factor of 2.8% (*Id.*, par. 9). It also states that "indirect source" confusion is the *weakest* of all confusion categories (*Id.*). The survey report concluded:

The foregoing results indicate that there is no significant likelihood that consumers who are exposed to Registrant's mark, MEYER VINEYARD will confuse Registrant's product with those of the Petitioner, MEIER'S, or MEIER'S WINE CELLARS (*Id.*).

\* \* \* \* \*

Based on the findings discussed above, my opinion is that Registrant's use of the MEYER VINEYARD mark is not "likely to cause confusion, to cause mistake, or to deceive to the damage and injury of Petitioner and the purchasing public. (*Id.*, par. 10).

**A. Likelihood of Confusion Is "Unlikely" When Consumer Survey Results Show Confusion Under 10%**

"When the percentage results of a confusion survey dip below 10 percent, they can become evidence which will indicate that confusion is not likely." 5 *McCarthy on Trademarks and Unfair Competition*, sec. 32.189 (2006). *Also see, Henri's Food Products Co. v. Kraft, Inc.*, 717 F. 2d 352, 357, 220 USPQ 386, 391 (7<sup>th</sup> Cir. 1983) (7.6% confusion reported in consumer survey is "a factor weighing against infringement") *Wuv's International, Inc. v. Love's Enterprises, Inc.*, 208 USPQ 736, 756, 1980 WL 3029 (D. Colo. 1980) (9% confusion in survey; no likelihood of confusion proven.); *S.S. Kresge Co. v. United Factory Outlet, Inc.*, 598 Fed. 2d 694, 697 (1<sup>st</sup> Cir. 1979) (7.2% of those surveyed believed THE MART and K-Mart were owned by the same people, but "similar sounding names" was insufficient to establish likelihood of confusion); *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 676 F. Supp. 1436, 1495 (E.D. Wis. 1987) (95.5% of survey respondent's not confused due to seeing source name of beer

producers on bottle labels); *Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F. Supp. 2d 305, 321, 54 USPQ 2d 1205 (S.D.N.Y. 2000) (5% level of confusion "negligibly low", no likelihood of confusion found – but, different products and other factors considered). In the present case, even generously giving Petitioner the benefit of using the maximum "indirect source" confusion rate of 7.4%, that percentage still falls well below the 10% threshold rate thereby militating against any likelihood of confusion.

**B. Defendant Acted In Good Faith In Adopting The "Meyer Vineyard" Mark**

MEYER VINEYARD was derived from the name "Meyer Corporation U.S." which is a gourmet cookware company related to Registrant, Meyer Intellectual Properties Limited. Meyer Corporation U.S. and its affiliates have been using the name "Meyer" since at least the early 1950's. (Exhibit F, par. 3). This name was adopted as part of a family of marks under the "Meyer" name in the house wares business. (*Id.*). The affiliates own 30 registrations of the "Meyer" trademark in 13 countries (*Id.*, par. 4). Registrant adopted the MEYER VINEYARD name and mark after an internet search and PTO search believing that there was no risk of consumer confusion between it and any other wine or beverage producer (Exhibit E, par. 2-3) (Exhibit F, par. 5), and continues in that belief. Registrant never had any intent to benefit from any goodwill associated with any other tradename or trademark (Exhibit F, par. 5), and there is no evidence that it has. Moreover, Petitioner has not introduced any facts or evidence to prove any inference that Registrant adopted the MEYER VINEYARD mark for the purpose of trading upon any recognition of the MEIER'S WINE CELLARS mark. Registrant's good faith in adopting its mark is therefore not an issue for consideration in the present motion. *W.W.W. Pharmaceutical Co. v. Gillette Co.*, 984 F.2d 567, 575, 25 U.S.P.Q. 65 (2d Cir. 1978) (because there was no evidence that defendant intended to promote confusion, no bad faith was found).

#### **IV. PETITIONER'S "FAMOUS MARK" ARGUMENT IS NULLIFIED BY THE SIGNIFICANT DISSIMILARITIES BETWEEN THE TWO MARKS IN THE PRESENT CASE**

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Petitioner argues that its mark is "famous" through its long use and that such use is a principal basis for finding likelihood of confusion in the present case. (Motion, p.12). However, the "famous mark" argument is negated when "there are significant differences between the mark whose fame is asserted and the mark which is alleged to be confusingly similar." *See, Land O'Lakes, Inc. v. Land O'Frost, Inc.*, 224 USPQ 1022, 1026-7 (TTAB, 1984) (No confusion between LAND O'LAKES famous mark and LAND O'FROST for meat products because of "obvious dissimilarities in appearance and pronunciation"). *Also see, Burns Philip Food, Inc., v. Modern Products, Inc.*, 28 USPQ2d 1687, 1689 (C.A.F.C., 1993) (Although famous mark SPICE ISLANDS on spices, no confusion with SPICE GARDEN because of different connotations and commercial impressions created between the two marks). In addition, see *Stouffer Corp. v. Health Valley Natural Foods, Inc.*, 1 USPQ2d 1900, 1906 (TTAB, 1986) (Although identical goods, channels of trade, and a famous mark, no confusion between LEAN CUISINE and LEAN LIVING due to different sound, appearance, and meaning).

Petitioner's argument that its mark is famous, and therefore should be cited against Registrant's mark is without merit and, in any event, *irrelevant* in the present case based upon the distinctly different sight, sound, and meaning of the two marks discussed above.

#### **Conclusion**

For the foregoing reasons, Petitioner has failed to demonstrate that there is a likelihood of confusion between the two distinctly different marks in the present case as a matter of law.

Accordingly, Petitioner's Motion for Summary Judgment should be denied, and judgment entered *sua sponte* in favor of Registrant as a matter of law.

Respectfully Submitted,

MEYER INTELLECTUAL PROPERTIES LIMITED  
Registrant,

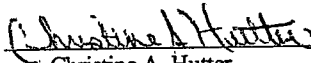
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# 4111686\_v2

**CERTIFICATE OF MAILING**

I hereby certify that this Request to Remove from Suspension is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514, on July 26, 2004.

  
Christine A. Hutter

**TRADEMARK**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant	:	Meier's Wine Cellars, Inc.
Mark	:	MEIER'S
Serial No.	:	76/465,378
Filed	:	November 7, 2002
Examining Attorney	:	Tracy Whittaker-Brown
Law Office	:	111
Last Office Action	:	July 14, 2003
Attorney Docket No.	:	PMTZ 5 00066
		Cleveland, Ohio 44114
		July 26, 2004

**REQUEST TO REMOVE FROM SUSPENSION**

Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

Dear Commissioner:

The Examiner suspended the subject application on July 14, 2003. The basis for the suspension is no longer applicable Serial No. 76/456,360, MEYER VINEYARD, issued on the Supplemental Register on December 23, 2003, and Serial No. 76/456,361, MEYER CHARDONNAY, was abandoned effective June 12, 2004.

**REGISTRANT'S EXHIBIT A**

Meier's v. Meyer  
Cancellation No. 92044883

**PMTZ-00087**

VIA FIRST CLASS MAIL

NO. \_\_\_\_\_

Reg. No. \_\_\_\_\_

Applicant: Meter's Wine Cellars, Inc.

Ser. No. 76/465,378

Title: WRIER'S

Filed 11/07/02

Attorney Docket No. PMTZ 5 00066

Initials SMK:cah

Date 07/26/04

☐ TRADEMARK/SERVICE MARK APPLICATION ( ITU )

Transmittal Letter

Specimens

☐ RECORDATION FORM COVER SHEET

☐ AMENDMENT/RESPONSE

☐ NOTICE OF APPEAL

☐ STATEMENT OF USE

Transmittal Letter

Specimens

Request for Extension of Time to File Statement of Use

☐ 8 & 15 AFFIDAVIT

Transmittal Letter

Specimens

☐ 8 & 9 RENEWAL APPLICATION

Transmittal Letter

Specimens

☐ NOTICE OF OPPOSITION

Request for Extension of Time to Oppose

☐ COPYRIGHT APPLICATION

Original Renewal

☐ CHECK IN AMOUNT \$ \_\_\_\_\_

☒ OTHER REQUEST TO REMOVE FROM  
SUSPENSION



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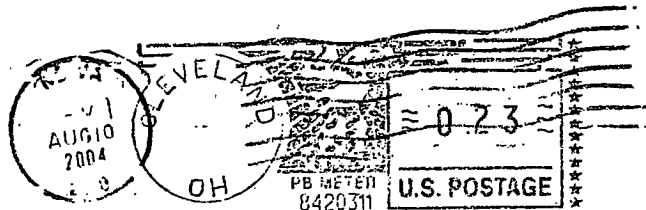
07-28-2004

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #77

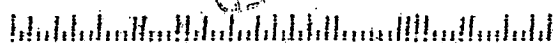
"DOCKETED"

PMTZ-00088





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CLEVELAND, OHIO 44114-2579



VIA FIRST CLASS MAIL

NO. \_\_\_\_\_

Applicant: <u>Meier's Wine Cellars, Inc.</u>		Reg. No. _____
Title <u>MEIER'S</u>		Ser. No. <u>76/465,378</u>
Filed <u>11/07/02</u>		
Attorney Docket No. <u>PMTZ 5 00066</u>	Initials <u>SMK:cah</u>	Date <u>07/26/04</u>
<input type="checkbox"/> TRADEMARK/SERVICE MARK APPLICATION ( _____ ITU)		
____ Transmittal Letter		
____ Specimens		
<input type="checkbox"/> RECORDATION FORM COVER SHEET		
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____ Transmittal Letter		
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____ Request for Extension of Time to File Statement of Use		
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<input type="checkbox"/> 8 & 9 RENEWAL APPLICATION		
____ Transmittal Letter		
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<input type="checkbox"/> NOTICE OF OPPOSITION		
____ Request for Extension of Time to Oppose		
<input type="checkbox"/> COPYRIGHT APPLICATION		
____ Original _____ Renewal		

☐ CHECK IN AMOUNT \$ \_\_\_\_\_  
☒ OTHER REQUEST TO REMOVE FROM  
SUSPENSION

RECEIPT IS HEREBY ACKNOWLEDGED

PMTZ-00090

Applicant asserts that there is no likelihood of confusion between MEIER'S for the goods stated in the application and MEYER VINEYARD. The cited MEYER VINEYARD mark gives the impression that the wine is produced from grapes from a particular vineyard. Applicant's mark on the other hand gives no such impression of familiarity with the owner of the mark (similar to EAT AT JOE'S or JOE'S CRAB SHACK or the like). Moreover, the cited mark's status on the Supplemental Register implies that MEYER VINEYARD is descriptive and, hence, non-distinctive. The Section 2(d) refusal should be withdrawn.

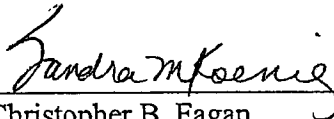
In the July 14, 2003 Notice of Suspension, the Examiner instructed Applicant to provide a statement in order to claim acquired distinctiveness. Applicant has already provided the Examiner with a Declaration to support its claim of distinctiveness. This Declaration was submitted on April 30, 2003. A copy of the previously submitted Declaration is enclosed for the Examiner's convenient reference. Note that the Declaration contains the required wording and was signed by the Chairman of Applicant on April 15, 2003.

Applicant has used the MEIER'S mark in association with the goods of Class 32 since 1895 and the goods of Class 33 since 1934. Applicant has very strong common-law rights in the mark that pre-date its filing. The distinctiveness of the mark is assured by this long period of use.

Early notification that the Section 2(d) basis for refusal had been withdrawn and that the Section 2(f) claim of distinctiveness has been accepted is earnestly solicited. The mark is believed to be in condition for acceptance and publication. Early notice to that effect is solicited.

Respectfully submitted,

FAY, SHARPE, FAGAN,  
MINNICH & McKEE, LLP

A handwritten signature in cursive script, reading "Sandra M. Koenig", is written over a horizontal line.

Christopher B. Fagan  
Sandra M. Koenig  
1100 Superior Avenue  
Seventh Floor  
Cleveland, OH 44114-2579  
(216) 861-5582

N:\PMTZ\500066\CAH0002791V001.doc

**TRADEMARK**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of : Meier's Wine Cellars, Inc.  
For : **MEIER'S**  
Serial No. : 76/465,378  
Filed : November 7, 2002  
Examining Attorney : Tracy Whittaker-Brown  
Law Office : 111  
Last Office Action : March 24, 2003  
Attorney Docket No. : PMTZ 5 00066

COPY

**DECLARATION**

Box RESPONSES NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

Dear Commissioner:

I am the Chairman of Meier's Wine Cellars, Inc., and am authorized to make this declaration on its behalf.

The MEIER'S mark has become distinctive of Applicant's goods by reason of the substantially exclusive and continuous use thereof as a mark by the Applicant in commerce for the five years preceding this declaration.

PMTZ-00093

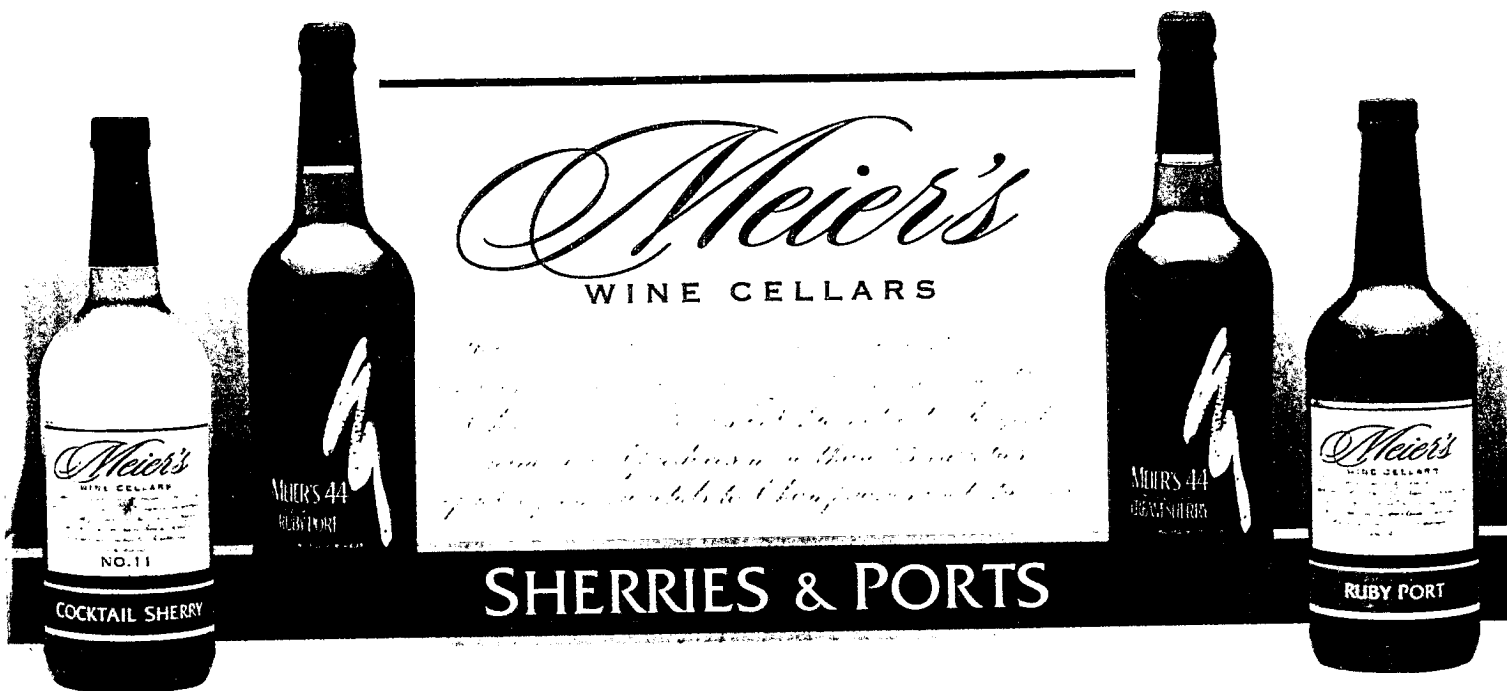
The undersigned hereby declares that all statements made herein of his own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any trademark registration issuing thereon.

**MEIER'S WINE CELLARS, INC.**

By: Robert A. Manchick  
Robert A. Manchick, Chairman

Date: 4/15/03

N:\PMTZ\500066\CAH0307A.wpd



*Meier's*  
WINE CELLARS

NO. 11

AMERICAN  
COCKTAIL SHERRY

Crisply dry and soft with a pale straw color. Skillfully blended to display a distinctive bouquet with a light, elegant nutty flavor.

*Meier's*  
WINE CELLARS

NO. 22

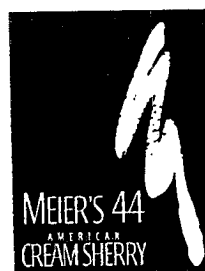
AMERICAN  
SHERRY

Medium dry and golden amber in color with the perfect balance between sweetness and acidity. Full-bodied and nut-like.

*Meier's*  
WINE CELLARS

NO. 33

Blended in the tradition of light Olorosos called "milk" sherries. Full-bodied and deep golden in color with a luscious bouquet and rich, nut-like taste.



Full-bodied and delightful-smooth with a nutty flavor. Blended in large oak casks, then placed outdoors for solera aging and weathering.

*Meier's*  
WINE CELLARS

AMERICAN  
RUBY PORT

A lighter version of 44 Ruby Port. Semi-sweet with a distinctively rich, fresh and fruity flavor. Light, smooth and velvety.

*Meier's*  
WINE CELLARS

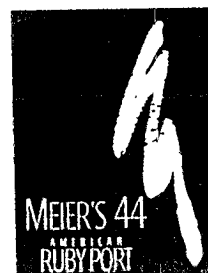
AMERICAN  
TAWNY PORT

Be-  
taw  
full  
wit  
vor

*Meier's*  
WINE CELLARS

AMERICAN  
MARSALA

**REGISTRANT'S EXHIBIT B**  
**Meier's v. Meyer**  
**Cancellation No. 92044883**



Distinctively rich and semi-sweet with a smooth, velvety taste characteristic of the finest ports. Skillfully blended, then cellared in oak.

VINTED AND BOTTLED BY MEIER'S WINE CELLARS, INC. SILVERTON, OHIO

PMTZ-00997

*Meier's*  
No. 11  
**COCKTAIL SHERRY**  
A very dry, soft white wine with a light,  
nutty flavor. Excellent as an aperitif.  
Serve slightly chilled.

GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.

CONTAINS SULFITES  
750 ML

0 85688 50114 8

*Meier's*  
WINE CELLARS  
*Meier's Wine Cellars began in the 1860's  
as a small grape juice business in southern  
Ohio. Today Meier's is Ohio's oldest & largest  
winery and produces more than 45 varieties  
of wine from varietals to Champagnes  
and sherries*  
**NO. 11**

**AMERICAN  
COCKTAIL SHERRY**  
WINED & BOTTLED BY MEIER'S WINE CELLARS, INC. SILVERTON, OHIO ALCOHOL 18% BY VOLUME

*Meier's*  
No. 22  
**SHERRY**  
Medium dry and golden amber  
with full-bodied nutty flavor. Serve chilled.

GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.

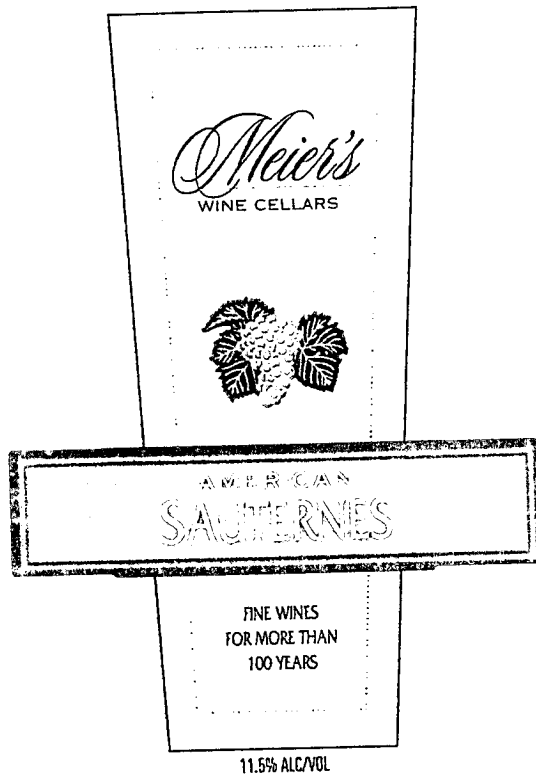
CONTAINS SULFITES  
750 ML

0 85688 50224 4

*Meier's*  
WINE CELLARS  
*Meier's Wine Cellars began in the 1860's  
as a small grape juice business in southern  
Ohio. Today Meier's is Ohio's oldest & largest  
winery and produces more than 45 varieties  
of wine from varietals to Champagnes  
and sherries*  
**NO. 22**

**AMERICAN  
SHERRY**  
WINED & BOTTLED BY MEIER'S WINE CELLARS, INC. SILVERTON, OHIO ALCOHOL 18% BY VOLUME





B566 = 894

RN 175  
Approved [Signature]  
Date 7/15/68  
Fee 5.00

147-72

## Application for Renewal of Trade Names

Be it known that Meier's Wine Cellars, Inc., <sup>a</sup> ~~person,~~  
~~partnership, corporation, firm, association, society, foundation, federation or organization~~ (strike words inappli-  
cable) or foreign corporation licensed to do business in this state, is the owner of the Trade-name registered  
under Sections 1329.01 to 1329.10, inclusive, of the Revised Code and herewith makes application for renewal of  
said trade-name in compliance with Section 1329.04 of the Revised Code of Ohio.

1. Date of registration under Section 1329.01 to 1329.10 4-24-36
2. Number of registration under Section 1329.01 to 1329.10 RN 175
3. Name and address of registrant under prior registration Meier's Wine Cellars, Inc.,  
6955 Plainfield Pike, Silvertown, Ohio 45236
4. Present name and address of applicant Meier's Wine Cellars, Inc., 6955 Plainfield  
Pike, Silvertown, Ohio 45236
5. If the answers to questions 3 and 4 are different, explain. \_\_\_\_\_
6. If applicant is a corporation, the State of Incorporation is Ohio
7. Name or title of registration to be renewed Meier's Wine Cellars
8. Address where business conducted 6955 Plainfield Pike, Silvertown, Ohio
9. General nature of business conducted Producer of Wines
10. The length of time during which the name, title or designation has been used by applicant in operations  
within this state is 73 years.

Trade Name Meier's Wine Cellars  
By [Signature]  
(Applicant or Agent of Applicant) Treasurer

STATE OF OHIO  
COUNTY OF Hamilton ss.

Michael D. Diver  
he is the applicant, agent of applicant (strike words inapplicable), and that all statements made in the above  
written application are true.

REGISTRANT'S GROUP EXHIBIT C

Meier's v. Meyer  
Cancellation No. 92044883

FILING FEE \$5.00

[Signature]  
(Notary)

MARY MARCELLA ELFERS  
Notary Public, Hamilton County, Ohio  
My Commission Expires Nov. 25, 1971

PMTZ-00184

**CERTIFICATE OF RENEWAL OF TRADE NAME**

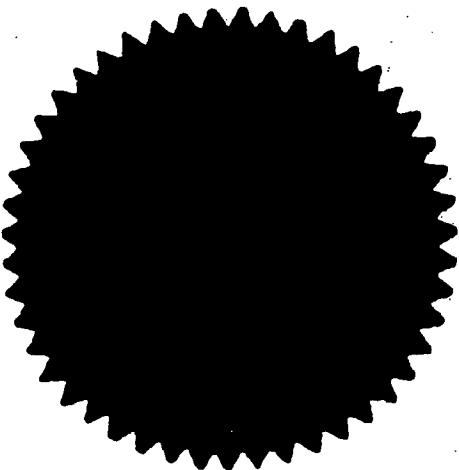
RN.....175.....

This office has received, approved and filed the renewal application of.....  
.....Meier's Wine Cellars, Inc.....  
whose business address is.....6955 Plainfield Pike.....  
.....Silverton, Ohio.....  
for the renewal of registration of the name, title or designation of.....  
.....MEIER'S WINE CELLARS.....  
in accordance with the provisions of Sections 1329.01 to 1329.10, inclusive, of the  
Revised Code of Ohio.

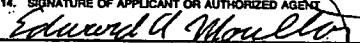
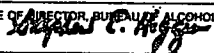
The applicant avers that the name, title or designation was first used.....73..years  
and this renewal expires.....April..24..1973.....


The application has been filed and recorded and the filing thereof indicated in the  
Index of Renewal of Names, Titles or Designations, this.....15.....day of.....July.....,  
19..68..., at Columbus, Ohio.

.....*Ted W. Brown*.....  
Secretary of State



DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
**APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL**  
 (See Instructions and Paperwork Reduction Act Notice on Back)

FOR ATF USE ONLY				PART I - APPLICATION	
1. VENDOR CODE (Required) <b>5688</b>		2. SERIAL NO. (Required) <b>87-11</b>		3. NAME AND ADDRESS AND PLANT REGISTRY NO. OR BASIC PERMIT NO. OF APPLICANT  <b>Meier's Wine Cellars, Inc.</b> <b>6955 Plainfield Pike</b> <b>Silverton, Cincinnati, Ohio 45236</b>	
5. BRAND NAME (Required) <b>Meier's</b>					
6. CLASS AND TYPE (Required) <b>Lake Erie Niagara</b>					
7. FANCIFUL NAME (If Any)					
8. VINTAGE (Wine Only)		9. AGE (Distilled SPIRITS)		4. TYPE OF APPLICATION (Check Applicable Box) a. <input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL b. <input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY" (Fill in State abbreviation) c. <input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount)	
10. FORMULA NO. (If Any)		11. LAB. ANALYSIS NO.			
12. STATE ANY WORDING, NOT SHOWN ON LABELS (Caps, coloseals, etc.)  <div style="text-align: center; padding: 5px;">Net contents blown into bottle</div>					
<b>PART II - APPLICANT'S CERTIFICATION</b>					
The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in item 4b. and that each container will bear the legend "For Sale in (State shown in item 4b.) only".					
13. DATE OF APPLICATION <b>7-25-87</b>		14. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;">   <b>Edward A. Moulton</b> </div> <div> <b>ATTN</b> </div> </div>			
<b>PART III - ATF CERTIFICATE</b>					
This certificate is issued subject to applicable laws and regulations and conditions as set forth on the back of this form.					
15. DATE OF BUREAU <b>MAR 02 1987</b>		16. SIGNATURE OF DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS <div style="text-align: center;">   <b>Director</b> </div>			
FOR ATF USE ONLY					TERMINATION DATE (If Any)
QUALIFICATIONS					



**MEIER'S WINE CELLARS**


• Great Wines for Over 100 Years •

**LAKE ERIE**

**NIAGARA**

A light, semi-dry wine  
with a fruity flavor.

VINTED AND BOTTLED BY MEIER'S WINE CELLARS, INC.  
SILVERTON, OHIO BW 45 ALCOHOL 11% BY VOLUME



**MEIER'S WINE CELLARS**

WHAT "LAKE ERIE" MEANS  
ON OUR LABEL

In 1983 the U.S. Government approved the south shore of Lake Erie as a special viticultural area. This area covers a strip ranging from six to fourteen miles wide following the natural escarpment that runs along the southern shore of Lake Erie. The prevailing winds and lake influences create unique grape growing characteristics that result in superior wine.

**LAKE ERIE**  
**NIAGARA**  
 A light, semi-dry wine with  
a fruity flavor.

CONTAINS SULFITES - 750 ML

ATF F. 5100.31 (10-85) REPLACES ATF FORMS 1048, 1049 AND 1050 WHICH ARE OBSOLETE

PMTZ-001946

**REGISTRANT'S GROUP EXHIBIT D**

Meier's v. Meyer  
 Cancellation No. 92044883

Form Approved: OMB No. 1512-0092 (04/30/95)

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
**APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL**  
(See Instructions and Paperwork Reduction Act Notice on Back)

178

PART I - APPLICATION			
ID 97157 000 000119	3. NAME AND ADDRESS AND PLANT REGISTRY NO. OR BASIC PERMIT NO. OF APPLICANT  MEIER'S WINE CELLARS, INC. 6955 PLAINFIELD PIKE SILVERTON, OHIO 45236 B.W. 45		
CT 8100 OR 89 AP	4. TYPE OF APPLICATION (Check Applicable Box) a. <input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL b. <input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY" (Fill in State abbreviation) c. <input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount)		
1. VENDOR CODE (Required) 5688	2. SERIAL NO. (Required) 97-002	5. BRAND NAME (Required) Meier's	
6. CLASS AND TYPE (Required) Niagara			
7. FANCIFUL NAME (If Any)			
8. VINTAGE (Wine Only)	9. AGE (Distilled)	10. FORMULA NO. (If Any)	
11. LAB. ANALYSIS NO.		12. STATE ANY WORDING, NOT SHOWN ON LABELS (Caps, celloseals, etc.)  NET CONTENTS BLOWN INTO BOTTLE	

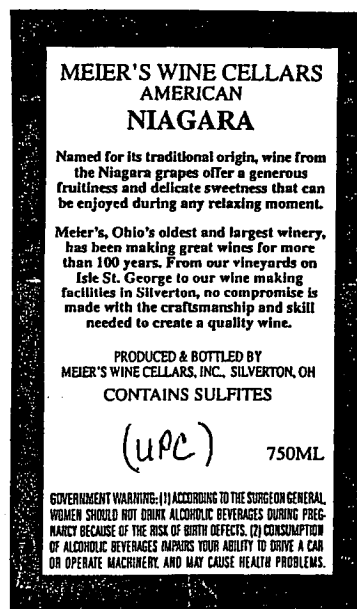
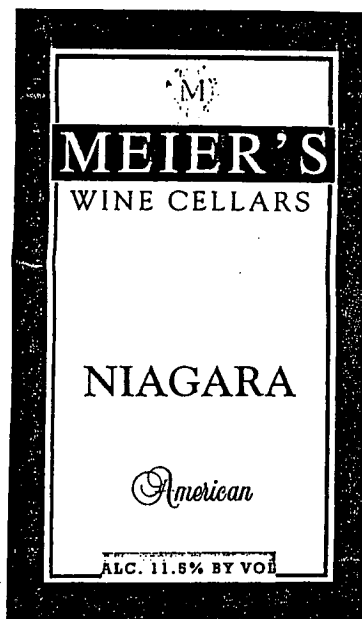
PART II - APPLICANT'S CERTIFICATION	
<p>The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in item 4b, and that each container will bear the legend "For Sale in (State shown in item 4b.) only".</p>	
13. DATE OF APPLICATION 6/5/97	14. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT <i>Alvin P. Meier</i> Attorney-in-Fact

PART III - ATF CERTIFICATE	
This certificate is issued subject to applicable laws and regulations and conditions as set forth on the back of this form.	
15. DATE ISSUED JUN 24 1997	16. SIGNATURE OF DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS <i>John A. Magaw</i>

FOR ATF USE ONLY	
QUALIFICATIONS	TERMINATION DATE (If Any)

LABEL MUST APPEAR ON THE FRONT CONTAINER

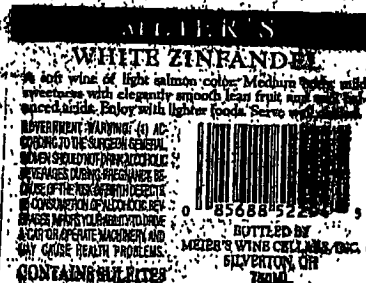
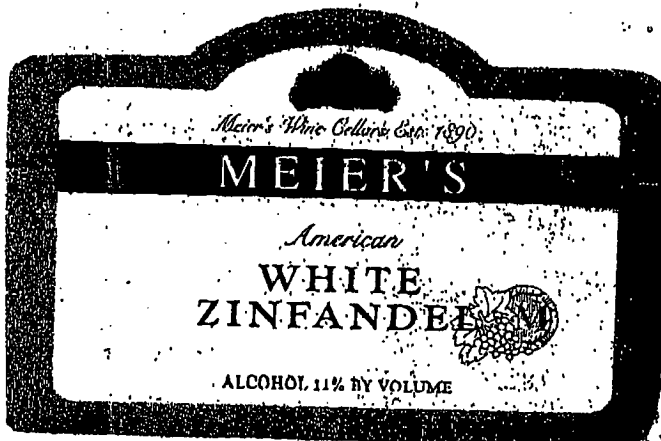
AFFIX COMPLETE SET OF LABELS BELOW



ID 01009-000-000053		OMB No. 1512-0092 (03/31/2001)	
CT <u>80</u> OR <u>00</u> AP		<b>DEPARTMENT OF THE TREASURY</b> <b>BUREAU OF ALCOHOL, TOBACCO AND FIREARMS</b> <b>APPLICATION FOR AND CERTIFICATION/EXEMPTION OF</b> <b>LABEL/BOTTLE APPROVAL</b> (See Instructions and Paperwork Reduction Act Notice on Back)	
1. VENDOR CODE (Required) 0 0 5 6 8 8		2. SERIAL NUMBER (Required) YEAR 0 1 - 0 0 0 1	
3. BRAND NAME (Required) Meier's		7. NAME AND ADDRESS OF APPLICANT AS SHOWN ON PLANT REGISTRY; BASIC PERMIT OR BREWER'S NOTICE (Required) MEIER'S WINE CELLARS INC. 6955 PLAINFIELD PIKE SILVERTON, OH 45236	
4. CLASS AND TYPE (Required) (Includes wine varietal designation, if applicable) White Zinfandel		7a. MAILING ADDRESS, IF DIFFERENT	
5. FANCIFUL NAME (If any)			
6. PLANT REGISTRY/BASIC PERMIT NO./BREWER'S NO. (Required) BW-OH-45 OH8-W-95			
8. FORMULA NO. (If any)	9. LAB. NO./DATE	10. NET CONTENTS 1.5L/750ml	11. PHONE NUMBER (513) 891-2900
12. AGE (Distilled Spirits)	13. ALCOHOL CONTENT 11%	14. VINTAGE (Wine products only; if stated on label)	15. FAX NUMBER (513) 891-6370
16. TYPE OF APPLICATION (Check applicable box) <input type="checkbox"/> a. CERTIFICATE OF LABEL APPROVAL <input type="checkbox"/> b. CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL (For sale in only (19 in State abbreviated) <input type="checkbox"/> c. DISTINCTIVE LIQUOR BOTTLE APPROVAL TOTAL BOTTLE CAPACITY BEFORE CLOSURE (If in exempt)			
17. SHOW ANY WORDING (N) APPEARING ON MATERIALS FIRMLY AFFIXED TO THE CONTAINER (e.g., caps, corks, etc.) OTHER THAN THE LABELS AFFIXED BELOW, OR (M) EMBOSSED ON THE CONTAINER. THIS WORDING MUST BE NOTED HERE EVEN IF IT DUPLICATES PORTIONS OF THE LABELS AFFIXED BELOW. ALSO, PROVIDE TRANSLATIONS OF FOREIGN LANGUAGE TEXT APPEARING ON LABELS. Net contents blown into bottle			
<b>PART II - APPLICANT'S CERTIFICATION</b> Under the penalties of perjury, I declare: that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents; truly and correctly represent the content of the containers to which these labels will be applied; I also certify that I have read, understood and complied with the conditions and instructions which appear on the reverse of an original ATF F 5100.31, Certificate/Exemption of Label/Bottle Approval.			
18. DATE OF APPLICATION 1/05/01	19. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT	20. TYPE NAME OF APPLICANT OR AUTHORIZED AGENT Danna M. Blocksidge, Attorney-in-Fact	
<b>PART III - ATF CERTIFICATE</b> This certificate is issued subject to applicable laws, regulations and conditions as set forth on the back of this form.			
21. DATE ISSUED JAN 12 2001	22. AUTHORIZED SIGNATURE, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS <i>Danna M. Blocksidge</i>		
QUALIFICATIONS		FOR ATF USE ONLY	

AFFIX COMPLETE SET OF LABELS BELOW

EXPIRATION DATE (If any)



## EXHIBIT D

Memorandum in Support of  
Motion for Summary Judgment

PMTZ-001995

TTB ID: 03169-000-000112		DEPARTMENT OF THE TREASURY ALCOHOL AND TOBACCO TAX AND TRADE BUREAU <b>APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL</b> (See Instructions and Paperwork Reduction Act Notice on Back)	
1. REP. ID. NO. (If any)		PART I - APPLICATION	
2. PLANT REGISTRY/BASIC PERMIT/BREWER'S NO. (Required) BW-OH-45		7. NAME AND ADDRESS OF APPLICANT AS SHOWN ON PLANT REGISTRY, BASIC PERMIT OR BREWER'S NOTICE. INCLUDE APPROVED DBA OR TRADENAME IF USED ON THE LABEL (Required)  MEIER'S WINE CELLARS, INC. 6955 PLAINFIELD ROAD SILVERTON OH 45236	
3. SERIAL NUMBER (Required) YEAR 0 3 - 0 0 1 6	4. TYPE OF PRODUCT (Required) <input checked="" type="checkbox"/> WINE <input type="checkbox"/> DISTILLED SPIRITS <input type="checkbox"/> MALT BEVERAGE	7a. MAILING ADDRESS, IF DIFFERENT	
5. BRAND NAME (Required) MEIER'S WINE CELLARS-No. 11			
6. FANCIFUL NAME (If any) COCKTAIL SHERRY			
8. EMAIL ADDRESS dblocksidge@paramountdistiller.com	9. FORMULA/SOP NO. (If any)	10. LAB. NO. & DATE/PRE-IMPORT NO. & DATE (If any)	17. TYPE OF APPLICATION (Check applicable box(es)) a. <input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL b. <input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL For sale in _____ only (Fill in State abbreviation) c. <input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount) d. <input type="checkbox"/> RESUBMISSION AFTER REJECTION TTB ID _____
11. NET CONTENTS 750ML/1.5L	12. ALCOHOL CONTENT 18%	13. WINE APPELLATION (If on label) AMERICAN	
14. WINE VINTAGE DATE (If on label)	15. PHONE NUMBER (513) 891-2900	16. FAX NUMBER (513) 891-6370	
18. SHOW ANY WORDING (a) APPEARING ON MATERIALS FIRMLY AFFIXED TO THE CONTAINER (e.g., caps, corks, etc.) OTHER THAN THE LABELS AFFIXED BELOW, OR (b) BLOWN, BRANDED OR EMBOSSED ON THE CONTAINER (e.g., net contents, etc.). THIS WORDING MUST BE NOTED HERE EVEN IF IT DUPLICATES PORTIONS OF THE LABELS AFFIXED BELOW. ALSO, PROVIDE TRANSLATIONS OF FOREIGN LANGUAGE TEXT APPEARING ON LABELS. NET CONTENTS BLOWN INTO BOTTLE			

## PART II - APPLICANT'S CERTIFICATION

Under the penalties of perjury, I declare: that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents, truly and correctly represent the content of the containers to which these labels will be applied. I also certify that I have read, understood and complied with the conditions and instructions which are attached to an original TTB F 5100.31, Certificate/Exemption of Label/Bottle Approval.

19. DATE OF APPLICATION 6/11/03	20. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT <i>Donna M. Blocksidge</i>	21. PRINT NAME OF APPLICANT OR AUTHORIZED AGENT DONNA M. BLOCKSIDGE, Attorney-in-Fact
------------------------------------	--	--

## PART III - TTB CERTIFICATE

This certificate is issued subject to applicable laws, regulations and conditions as set forth in the instructions portion of this form.

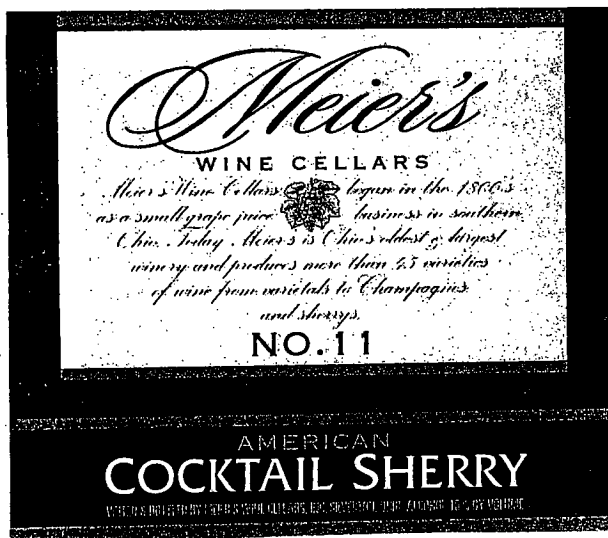
22. DATE ISSUED JUN 26 2003	23. AUTHORIZED SIGNATURE, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU <i>Michelle M. Sp...</i>
--------------------------------	--

FOR TTB USE ONLY

QUALIFICATIONS

EXPIRATION DATE (If any)

AFFIX COMPLETE SET OF LABELS BELOW (See General Instructions 4, 6 and 7)



PMTZ-002010

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of  
Trademark Reg. No.: 2,799,507  
For the mark: MEYER VINEYARD  
Registered: December 23, 2003

<b>MEIER'S WINE CELLARS, INC.,</b>	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92044883
v.	)	
	)	
<b>MEYER INTELLECTUAL PROPERTIES LIMITED,</b>	)	
	)	
Registrant.	)	

**DECLARATION OF KARIN DISMUKE**

I, Karin Dismuke, declare as follows:

1. I am currently employed by Meyer Corporation, U.S. ("Meyer") with offices at One Meyer Plaza, Vellajo, California, 94540. I have worked for Meyer since 1993. Part of my time involves working for Hestan Vineyards that produces and bottles the MEYER VINEYARD brand of wines. I am the Business Manager of Hestan, and I have personal knowledge of the facts stated herein.

2. In 2002, my duties included coordinating and maintaining six different websites for Meyer, and assisting the Chairman of Meyer with various tasks. In this regard, in 2002, I conducted an internet search including a U.S. Patent and Trademark Office website search to ascertain whether the MEYER VINEYARD name, or any similar name, was used by any other entity.

**REGISTRANT'S EXHIBIT E**

Meier's v. Meyer  
Cancellation No. 92044883



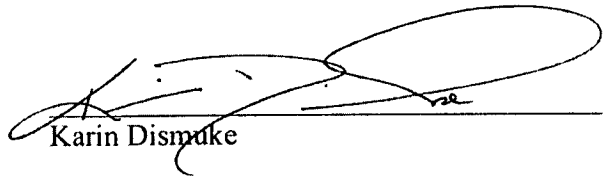
Registrant, Meyer Intellectual Properties Limited. At that time, I had never heard of Meier's Wine Cellars nor did that name come up during my search. The first time I heard of Meier's Wine Cellars was when it filed the present cancellation proceedings in August 2005.

4. A true and correct copy of Registrant's first bottle label used on its 2001 vintage Chardonnay is attached hereto as **Exhibit 1**. The 2002 and 2003 vintage Cabernet Sauvignon bottle label emphasized the MEYER VINEYARD name and outdoor theme. **Exhibits 2 and 3** attached hereto are true and correct copies of labels used on Registrant's vintage 2002 and 2003 bottles.

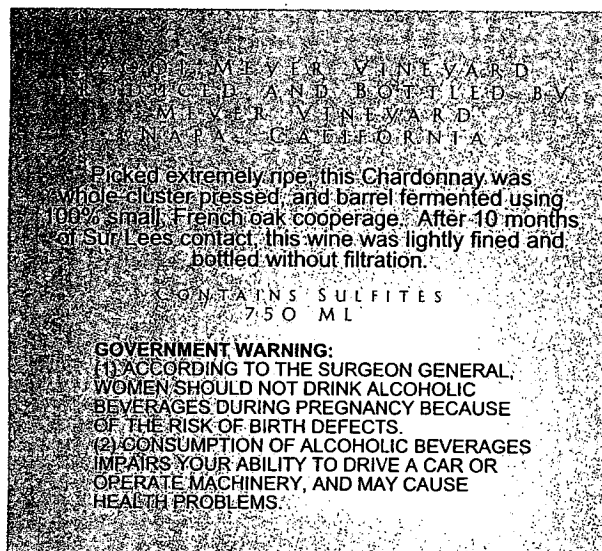
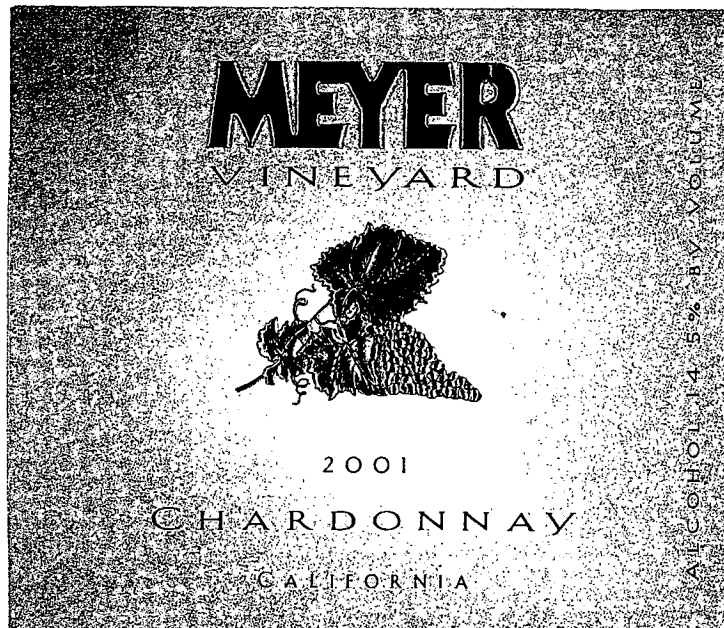
5. In addition, for its vintage 2003 Cabernet, Registrant began using a new label that is silk screened over glass in gold block letters featuring the MEYER VINEYARD name. **Exhibit 4** attached hereto is a true and correct photograph depicting the MEYER VINEYARD name and bottle.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

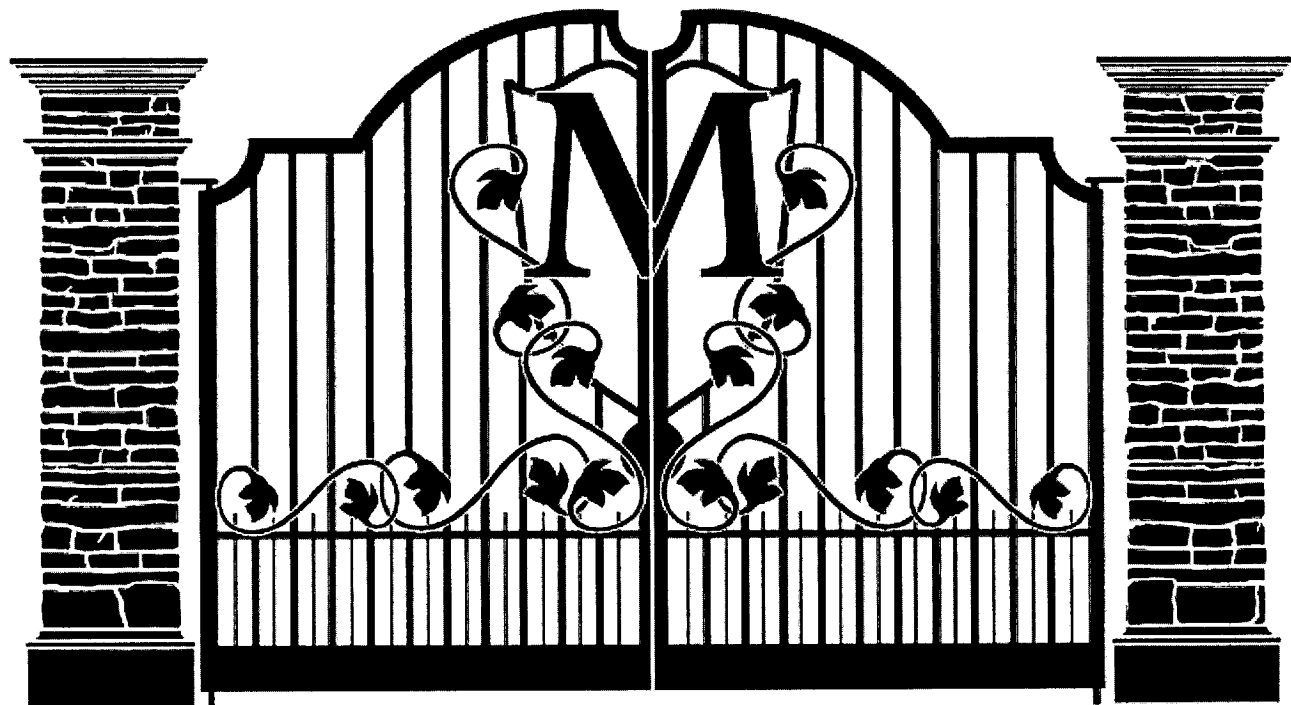
Executed on May 31, 2007.

  
Karin Dismuke

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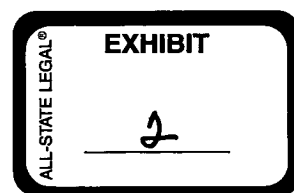


# MEYER VINEYARD



CABERNET SAUVIGNON  
NAPA VALLEY

2002



MEYER VINEYARD

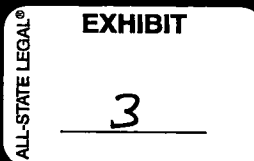
2003

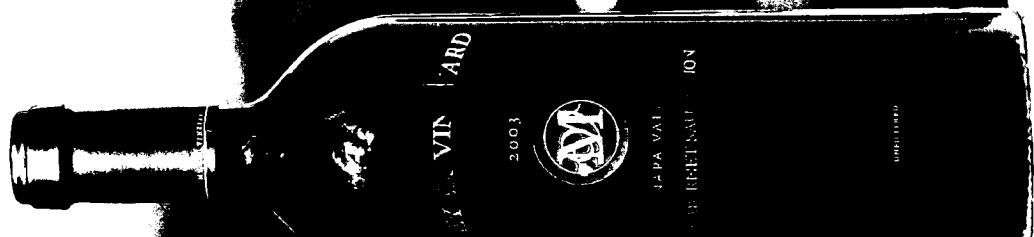


NAPA VALLEY

CABERNET SAUVIGNON

UNFILTERED





ALL-STATE LEGAL®

EXHIBIT

4

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of  
Trademark Reg. No.: 2,799,507  
For the mark: MEYER VINEYARD  
Registered: December 23, 2003

**MEIER'S WINE CELLARS, INC.,**

Petitioner,

v.

**MEYER INTELLECTUAL PROPERTIES  
LIMITED,**

Registrant.

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Cancellation No. 92044883

**DECLARATION OF DEAN KRAUSE**

I, Dean Krause, declare as follows:

1. I am the Vice President/General Counsel for Meyer Corporation, U.S. ("Meyer") with offices at One Meyer Plaza, Vallejo, California 94590. I am also an attorney representing Meyer Intellectual Properties Limited, a British Virgin Islands corporation ("Registrant"). Registrant and Meyer are wholly-owned affiliates. I have been employed by Meyer since June 1, 2003. I have been representing Registrant for its entire existence, since its formation in 2001.

2. My duties as attorney for Registrant include overseeing intellectual property matters, including trademarks, and in such capacity I am personally familiar with the facts stated herein.

3. The MEYER VINEYARD trademark was derived from the name of Registrant's group, which is also one of the brand names under which it sells products. Meyer and its

**REGISTRANT'S EXHIBIT F**

Meier's v. Meyer  
Cancellation No. 92044883

affiliates have been using the "Meyer" name since at least the early 1950s. This name was adopted as part of a family of marks under the "Meyer" name in the housewares business.

4. Meyer, together with its affiliates, has been one of the dominant leaders in the design, manufacture, and marketing of quality cookware in the world since 1971. To date, Meyer and its affiliates sell their products in over thirty countries and own thirty registrations of the Meyer mark in thirteen countries. Additionally, the affiliates use "Meyer" as part of their corporate name in at least fifty different instances.

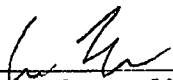
5. Registrant adopted the MEYER VINEYARD tradename for wines believing there was no risk of any consumer confusion between it and any other wine or beverage producer, and it continues in that belief. Registrant never had any intent to benefit from any goodwill associated with any other trade name or trademark. As stated in the accompanying Declaration of Karin Dismuke, an internet search and a PTO search were made at the time of filing Registrant's application to register the MEYER VINEYARD tradename in 2002, and the Meier's Wine Cellars name or mark did not appear.

6. When Registrant's marks are applied on labels or packaging for wine, it always appears as MEYER VINEYARD as opposed to MEYER alone.

Signature is on the following page.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

Executed on May 31, 2007.

  
\_\_\_\_\_  
Dean Krause, VP / General Counsel  
Meyer Corporation, U.S.

# 4548969\_v1



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of  
Trademark Reg. No.: 2,799,507  
For the mark: MEYER VINEYARD  
Registered: December 23, 2003

<b>MEIER'S WINE CELLARS, INC.,</b>	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92044883
v.	)	
	)	
<b>MEYER INTELLECTUAL PROPERTIES</b>	)	
<b>LIMITED,</b>	)	
	)	
Registrant.	)	

**DECLARATION OF CRAIG M. JOSEPH, PhD**

I, Craig M. Joseph, PhD. declare as follows:

1. I am a Director at FTI Consulting, Inc., a multidisciplinary litigation consulting and research firm with offices in New York, Boston, Washington DC, Los Angeles, Dallas, Atlanta, and a number of other cities in the United States and around the world. My office is located at 333 W. Wacker Drive, Chicago, Illinois 60606. I have personal knowledge of the facts set forth herein, and if called as a witness in the above cause, I could and would testify competently to said facts.

2. FTI has conducted numerous surveys studying likelihood of confusion, secondary meaning, and dilution for use in trademark litigation. I myself have personally designed and conducted approximately 20 such surveys during the last 10 years. My background experience in conducting such surveys and related matters is stated on my Curriculum Vitae which accurately states my professional experience. (See, Exhibit 1 attached hereto).

**REGISTRANT'S EXHIBIT G**

Meier's v. Meyer  
Cancellation No. 92044883

3. In June 2006, I was contacted by the law firm of Holland & Knight LLP, attorneys for Meyer Intellectual Properties Limited, and asked whether I was available to conduct a consumer survey using the MEYER VINEYARD trademark to ascertain whether there was any likelihood of consumer confusion between the MEYER VINEYARD trademark and the MEIER'S WINE CELLARS trademark for use as evidence in the above cancellation proceedings. In July and August, 2006, I designed and conducted a mall intercept consumer survey of 340 men and women. The survey was conducted in 4 geographically dispersed cities: Los Angeles; Washington, D.C.; Austin, Texas; and Cleveland, Ohio. Approximately 85 interviews were conducted in each city.

4. Interviews based upon my survey questionnaire, and under my direction and control, were conducted in shopping malls by independent professional marketing research firms with permanent office facilities in said malls. The interviewers were not informed of the name of the client for whom the survey was being taken, nor were they told that it was for use in litigation. They also were not informed of the purposes of the survey because experience has shown that the lack of such information tends to reduce or eliminate error caused by bias towards answers which the interviewer expects or wants to hear.

5. A qualified Respondent for the survey was defined as a person over 21 years of age who purchased a bottle of wine in the previous 6 months. Each Respondent was taken in a room and shown a bottle of the MEYER VINEYARD wine for 30 seconds and after the bottle was covered, asked several "open-ended" questions which were designed to elicit Respondent's answers in his/her own words (Consumer Survey, Exhibit 2, pp. 1-3).

6. In the first question each Respondent was asked to "describe what you saw". The survey showed that 35.5% mentioned "MEYER", 68.2% mentioned "black or dark bottle", and 39.1% mentioned "gold lettering". (*Id.*, p. 9, Q: 7). Each Respondent was then asked "Who do you think puts out this wine you just saw?" The survey showed that:

48.2% said "Meyer"  
11.8% answered "Napa Valley"  
30% said they "Don't know."

No Respondent answered that Meier's or Meier's Wine Cellars was a source of the wine, even in Petitioner's home state, Ohio (*Id.*, p. 10, Q: 8).

7. To measure any possible association with MEYER and MEIER'S, each Respondent was then asked whether he/she thought the company who puts out the wine bottle they saw also puts out other wines or other products. The survey showed that 68.7% answered "Yes." (*Id.*, p. 12, Q: 9a). As a follow up question to those Respondents who answered "Yes," each was asked "What other products?" The study further showed that those who answered, 25 Respondents, or 7.4%, said "Wine Coolers," "Sangria," and "Fruit Juices." These Respondents were deemed by the study to have "indirectly" refer to Petitioner, Meier's Wine Cellars, Inc. because it also sells similar products. (*Id.*, p. 13). With respect to the three types of possible confusion sought to be measured, the survey found (i) a zero "direct source" confusion with Meier's, (ii) a 7.4% "indirect source" confusion with Meier's, and (iii) zero "association confusion" with Meier's. (*Id.*, p. 16).

8. Coding, tabulation and validation. As Paragraph 7 indicates, completed interviews were coded for mentions of "Meyer," "Meier's," and a number of other relevant proper names and other words. These were tabulated by myself, by counting the frequency of mentions of each coded word or phrase. There were no responses whose coding or tabulation

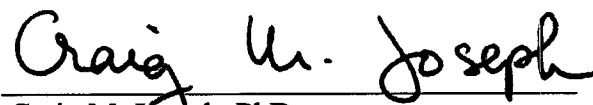
was problematic or ambiguous. The interviewing was also extensively validated. At each interviewing location, a majority of interviews were tape-recorded. Contemporaneous with the interviewing, a colleague, under my direction, randomly selected a subset of interviews from each site and listened to them to ensure that they had been completed properly and according to instructions. The proportion of all interviews that were validated in this way was approximately 30%, which is actually significantly greater than the standard validation rate of 10%.

9. The maximum rate of confusion of all types using reasonable assumptions was 7.4% plus or minus error factor of 2.8%. In my experience, and according to industry standards, "indirect source" confusion is the weakest of all confusion categories. (*Id.*, p. 14). The survey report concluded that there is no significant likelihood that consumers who were exposed to Registrant's mark MEYER VINEYARD will confuse Registrant's product with those of the Petitioner MEIER'S or MEIER'S WINE CELLARS.

10. Based on the findings discussed above, my opinion is that Registrant's use of the MEYER VINEYARD mark is not likely to cause confusion, to cause mistake, or to deceive to the damage and injury of Petitioner and the purchasing public (*Id.*, p. 16-17). A true and complete copy of my report is attached hereto as Exhibit 2, and is incorporated into this Declaration by reference.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 1, 2007.

  
Craig M. Joseph, PhD



## Craig M. Joseph, PhD

Director - Forensic and Litigation Consulting

[craig.joseph@fticonsulting.com](mailto:craig.joseph@fticonsulting.com)

333 West Wacker Drive  
Suite 600  
Chicago, IL 60606  
Tel: (312) 606-2616  
Fax: (312) 759-8119

Dr. Craig Joseph is a Director in FTI's Forensic and Litigation Consulting practice and is based in Chicago. Dr. Joseph has more than 10 years of experience conducting social science research in academic, public policy, business and litigation settings. His primary areas of expertise are the design and analysis of research to assess juror decision-making in complex civil litigation, the development of trial communication strategy, and the use of survey research in trademark litigation. His services for clients include focus groups and mock trials, development of opening and closing statements, design of visual communication strategy, and technical and strategic support at trial.

Dr. Joseph has provided advice and assistance in a variety of areas including antitrust, securities fraud, trademark and patent infringement, personal injury, product liability, commercial contracts, employment, toxic torts, and medical malpractice.

Dr. Joseph has also consulted on cases in which survey evidence is required to assess likelihood of confusion, secondary meaning, trademark dilution, and other phenomena relevant to trademark infringement matters.

Finally, Dr. Joseph also has experience in using econometric and social science methods in matters pertaining to class certification, unpaid overtime, and other issues. He has designed questionnaires and critiqued opposing experts' methods and findings in these areas.

Among the clients Dr. Joseph has worked with are Bartlit Beck Herman Palenchar & Scott; Davis, Cedillo & Mendoza; Heller Ehrman White and McAuliffe; Katten Muchin Zavis Rosenman; Kirkland & Ellis; Mayer, Brown, Rowe & Maw; Neal, Gerber & Eisenberg; Holland and Knight; and Wilson, Sonsini, Goodrich and Rosati.

Prior to joining FTI in 2001, Dr. Joseph was a Project Director at Leo J. Shapiro Associates in Chicago, where he designed and conducted surveys to measure likelihood of confusion, trademark dilution, and related phenomena for trademark litigation, and also conducted mock jury studies. He has also been a consultant for Trial Consultants, Inc., where he designed and analyzed focus group studies and assisted clients with jury selection and voir dire.

In addition to his work for FTI, Dr. Joseph is also a Postdoctoral Research Associate at the University of Chicago, where he works on several ongoing studies. He has taught courses in psychology, decision-making, research methodology and psychology and law at the University of Chicago, DePaul University, the University of Illinois at Chicago, and the City Colleges of Chicago.

Dr. Joseph holds a Ph.D. in Psychology and Human Development and a B.A. in Political Science from the University of Chicago. He is a member of the American Psychological Association, the American Psychological Society, the American Sociological Association, and the American Association for Public Opinion Research.



[www.fticonsulting.com](http://www.fticonsulting.com)

**Cases in Which Dr. Joseph Has Offered Expert Opinion and/or Testimony**

*Neopost Industrie B.V., Neopost, Inc., Neopost S.A., and Hasler, Inc. v. PFE International, Inc. and PFE International Limited* (U.S. District Court, Northern District of Illinois). Expert report (trademark survey), deposition testimony.

*City of Chicago v. Milwaukee County* (Trademark Trial and Appeal Board, U.S. Patent and Trademark Office). Expert report (trademark survey – secondary meaning).

*The Tribune Company Holdings, Inc. and Media General Operations, Inc. v. Times Publishing Company* (U.S. District Court, Middle District of Florida). Expert report (likelihood of confusion survey), deposition testimony.

*Meier's Wine Cellars, Inc. v. Meyer Intellectual Properties Limited* (currently before Trademark Trial and Appeal Board, U.S. Patent and Trademark Office). Expert report (likelihood of confusion survey).

*Mike Rutti, et al. v. Lojack* (currently in U.S. District Court, Central District of California). Expert report on a survey in an employment class action matter.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration No. 2,799,507  
For the mark MEYER VINEYARD  
Date registered December 23, 2003

Meier's Wine Cellars, Inc.,

Petitioner,

v.

Meyer Intellectual Properties Limited,

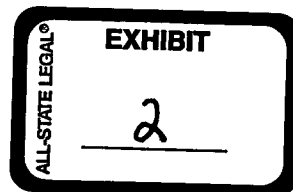
Registrant.

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) Cancellation No. 92044883  
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EXPERT REPORT OF CRAIG M. JOSEPH  
REGARDING CONSUMER SURVEY

I. EXECUTIVE SUMMARY

My name is Craig Joseph. I am a Director at FTI Consulting, Inc. I have a Bachelor of Arts degree in political science and a PhD in psychology from the University of Chicago. I have designed and analyzed surveys in academic, market research, and litigation contexts for approximately ten years, and during that time I have designed and conducted approximately twenty consumer surveys for trademark disputes, and have filed reports of such surveys and been deposed in two previous cases. I am a member of a number of professional societies and associations, including the American Psychological Association, the American Psychological Society, the American Sociological Association, the Society for Personality and Social Psychology, and the American Associa-



tion for Public Opinion Research. A copy of my curriculum vitae is appended to this report as Exhibit 1.

I have been retained by counsel for Meyer Vineyard ("Meyer"), the Registrant in the above-referenced matter. My firm is being compensated for my work at my standard billing rate of \$250 per hour. Payment for my services in this matter is not contingent on either my findings or my opinions.

I understand that Meyer is the owner of the mark MEYER VINEYARD in association with WINE in Class 33. I also understand that Petitioner is the owner of the trademark MEIER'S, which it uses as a trademark for sparkling fruit juices and for wines. I further understand that Petitioner has filed a petition to cancel Registrant's trademark registration because, as stated in Petitioner's First Amended Petition to Cancel,

Registrant's mark, MEYER VINEYARD, as registered in association with WINE, so resembles Petitioner's MEIER'S mark for SPARKLING FRUIT JUICES AND DEALCOHOLIZED TRIPLE SEC in Class 32 and STILL WINES, SPARKLING WINES, SHERRY WINES, PORT WINES, MARSALA WINES, COOKING WINES, AND SWEET AND DRY VERMOUTHS in Class 33 as to be likely to cause confusion, to cause mistake, or to deceive, to the damage and injury of Petitioner and the purchasing public.<sup>1</sup>

Meier's' petition, therefore, is predicated on the empirical claim that purchasers of still wine (which is the only product sold by the Registrant as of the date of this report), on encountering MEYER VINEYARD wines in the marketplace, will be "confus[ed]," "mistake[n]," or "deceive[d]" as to the source of the MEYER product, incorrectly believing it to be the Petitioner's product and thereby depriving the Petitioner of sales.

Put more straightforwardly, the Petitioner theorizes that consumers intending to buy a MEIER'S product will see a MEYER VINEYARD wine on the shelf, mistake it for the

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<sup>1</sup> First Amended Petition to Cancel at 2.



MEIER'S product, and purchase it (the MEYER VINEYARD wine) instead, thus diverting a sale from Petitioner to Registrant.

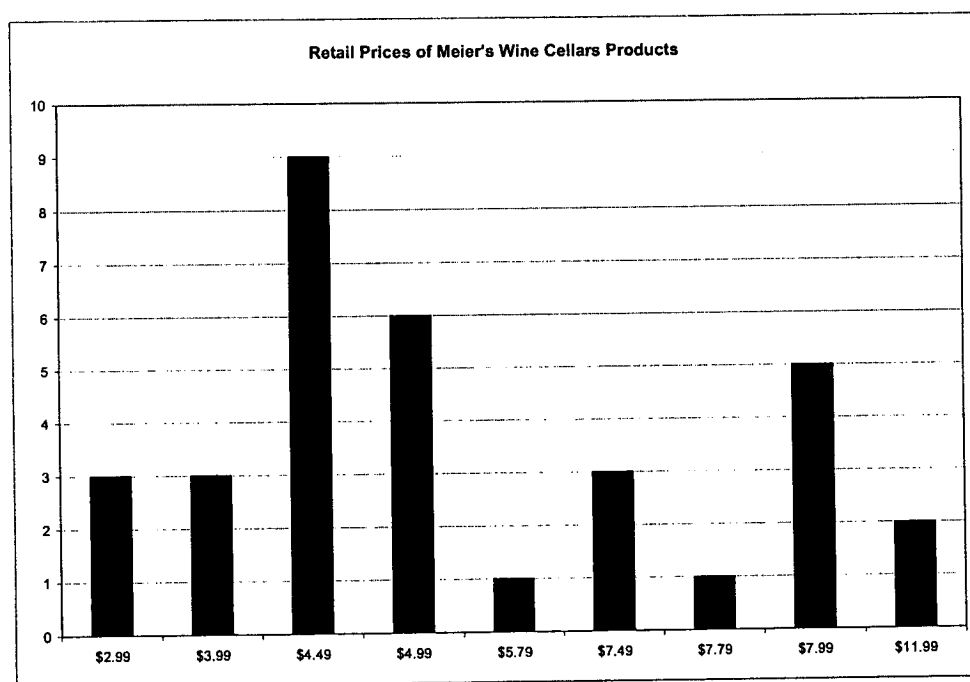
Counsel for Registrant retained me to design, conduct and analyze a consumer survey that would determine whether consumers are likely to be confused as between the MEIER'S trademark and the MEYER VINEYARD mark in the context of wines. The findings of this consumer survey are set forth in this report. Briefly, they are:

1. Consumers do not display confusion as to the source of the Registrant's goods. No respondent named MEIER'S as the source of the wine they were shown (a bottle of Meyer Vineyard 2003 Cabernet Sauvignon).
2. A plurality of respondents – 48% – correctly identified MEYER VINEYARD as the source of the bottle of wine they were shown. Another 12% referenced "Napa Valley," the location of Meyer Vineyard which is printed on the bottle. An additional thirty percent of respondents said that they did not know who put out the wine they saw, or could not remember its name.
3. Consumers surveyed also showed a very low level of source confusion measured indirectly, that is, through asking them what other products, if any, are put out by the company that puts out the product they saw. Again, zero respondents named the Petitioner. However, using a moderate, reasonable construal of the open-ended responses, source confusion measured in this way is 7.4%.
4. In sum, the total likelihood of confusion (source confusion measured directly, plus source confusion measured indirectly, plus association confusion), based on the findings of this survey, is 7.4%.

A complete list of the documents and other materials I have reviewed in connection with the preparation of this report is attached as Exhibit 2.

## II. SURVEY DESIGN AND METHODOLOGY

In designing the consumer survey, I consulted a number of documents produced in this matter by both Petitioner and Registrant for information as to the range of products at issue, their retail prices, their appearance, and other relevant issues. One thing that is particularly noteworthy with respect to the products of Petitioner and those of Registrant is the large difference in their respective retail prices. According to a Meier's Wine Cellars price list<sup>2</sup>, Petitioner's products range in price from \$2.99 to \$11.99. The chart below summarizes the distribution of Meier's' product prices, as set forth in that list:



In contrast, the retail price of Meyer Vineyard products (of which, at the time of the research reported herein, there was only one – a 2003 Cabernet Sauvignon) are significantly higher. According to the web page of Hestan Vineyards, which sells Meyer Vineyard wine on the Internet, the price per 750 ml bottle is \$40 – almost four times the

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<sup>2</sup> Marked "EXHIBIT JA" to Petitioner's Memorandum in Support of its Motion for Summary Judgment.

price of Petitioner's products.<sup>3</sup> The same source cites the price of a double magnum of the same wine – a single bottle containing the equivalent of four regular-sized bottles – as \$500.

As an initial observation (and without offering an economic analysis of consumer behavior in this connection) from a consumer psychology point of view, these facts about price points strongly suggest that consumers are unlikely to confuse the two marks at issue in such a way that someone intending to purchase Petitioner's product would mistakenly purchase Registrant's product. The reason is that a consumer intending to purchase a Meier's product would be expecting to spend as little as \$2.99 and no more than \$11.99. Such a consumer encountering a bottle of Meyer Vineyard 2003 Napa Valley Cabernet Sauvignon would be very likely, once he or she noticed the price of the Meyer wine, to (a) realize that the Meyer wine was not what he or she was looking for, or (b) seek further information about the Meyer wine and the Meier's products available in the particular store.

Partly because of this large difference in retail prices between Petitioner's products (\$2.99 to \$11.99) and Registrant's product (\$40), the consumer survey focused on the MEYER VINEYARD mark itself, in the context of the product's packaging – that is, a bottle of Meyer Vineyard 2003 Napa Valley Cabernet Sauvignon. Respondents were given no information about the price of the Meyer wine or any other wines, because doing so would most likely have the effect of making confusion on the basis of similarity between the marks less likely.

With that methodological note in mind, I turn to a description of the elements of the survey's design and methodology.

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<sup>3</sup> Printout of a Hestan Vineyards web page, marked "EXHIBIT JB" to Petitioner's Memorandum in Support of its Motion for Summary Judgment.

Universe. The universe for this consumer survey, that is, the population of consumers that was considered relevant, was defined as adults (over 21 years of age) who, in the last six months, had purchased a bottle of wine.

Interviewing locations. Interviewing was conducted in four metropolitan areas chosen to represent roughly the geographic spread of the United States. Interviews were conducted in shopping malls by independent professional marketing research firms with permanent office facilities in the malls. The interviewing locations are listed in the table below. The "Average Income" column represents the average total household income of mall patrons; this information is provided by the malls' management companies.

	City	Mall Name	Avg. Income
1	Los Angeles, CA Metro	Northridge Mall Northridge, CA	\$83,000
2	Washington DC Metro	Lakeforest Mall Gaithersburg, MD	\$96,500
3	Austin, TX	Lakeline Mall	\$75,000
4	Cleveland, OH	Parma Town Mall	\$42,000

The Cleveland location was chosen not only because it is located in the Midwest, but particularly because it is in Ohio, as is the Petitioner' base of operations. I reasoned that due to this fact, recognition of Petitioner's brand and products, and therefore the possibility of confusion due to the Registrant's MEYER VINEYARD mark, would be highest in this location.

Questionnaire. The questionnaire was designed to assess consumers' confusion, if any, between MEYER VINEYARD, the Registrant's mark, and MEIER'S or MEIER'S WINE CELLARS, the Petitioner's mark. Several questions, which will be set out in detail be-

low, were used to probe for confusion. First, the consumer (who was first shown a bottle of Registrant's product, Meyer Vineyard 2003 Napa Valley Cabernet Sauvignon) was asked (after the bottle had been removed from view) to describe in their own words, what he or she had just seen. Second, the consumer was asked two questions to determine whether he or she was confused as to the source of the product. Finally, the consumer was asked a question to determine whether he or she displayed confusion as to association between the Registrant and the Petitioner.

A true and accurate copy of the questionnaire used in the consumer survey is appended to this report as Exhibit 3.

Basic interviewing method. Interviews were conducted in a face-to-face manner by professional interviewers who were trained for this project and supervised by people working under my direction. Interviewers were stationed on the main floor of the mall, and approached mall patrons and asked if they would be willing to participate in a short interview in exchange for an honorarium of \$5. Willing candidates were then asked a series of questions to determine whether they were (a) 21 years of age or older, and (b) had purchased a bottle of wine in the last six months.

Once a respondent was determined to be qualified and willing to participate, the interviewer guided the respondent to a room in the interviewer's offices. In this room was a table with two chairs, and a bottle of Meyer Vineyard 2003 Napa Valley Cabernet Sauvignon, obscured by a legal-sized manila folder standing between the respondent and the bottle. The respondent was asked to sit down facing the folder. The interviewer told the respondent that he or she would be shown a product, and then asked a few questions about it. Once the folder was removed, the respondent was allowed to look at the bottle for thirty seconds, handling it if he or she so chose. After thirty seconds, or once the respondent indicated that he or she was finished looking at the bottle, it was replaced on the table and the folder was replaced in front of it.

Coding of verbatim responses. Four of the main questions in the survey (that is, the questions specifically pertaining to the stimulus viewed by respondents) are what survey researchers call "open-ended" questions, which means that respondents do not choose their answers from a short list of pre-defined responses, but rather answer in their own words, at whatever length they choose. In order to be tabulated, responses to such questions ("verbatim responses") must first be coded in order to extract the information that is relevant to the purposes of the survey. For example, in the present case relevant information generally includes whether a respondent's answer to a question indicates that he or she had MEIER'S in mind, because if so, that would potentially be evidence of confusion.

One aspect of the interviewing methodology is extremely important to note when reading these verbatim responses. Interviewers were instructed that, whenever a respondent mentioned what sounded like a proper name in his or her response to an open-ended question, that they were to ask for the spelling of the name and indicate that they had done so by placing square brackets around it.

### III. FINDINGS

The following sections describe the questions asked of respondents and tabulates their responses.

#### Question 7

The respondent was first asked to describe, in his or own words, what he or she saw. The purpose of this question was to determine, first, whether respondents would name the source or brand name of the wine without any prompting, and second, for an indication of what kinds of features of the stimulus respondents recalled. A complete listing of responses to this question is attached to this report as Exhibit 4.

In general, most respondents mentioned some feature of the physical appearance of the bottle (for example its color, the color of the lettering, its heaviness) or the information contained on it (for example the name or maker of the wine, its alcohol content, and state-mandated warnings). This diversity of responses is consistent with the respondents not knowing at this point the purpose of the study.

The tables below show tabulations of mentions of just two specific features of the bottle. First, with respect to mentions of the source, none of the respondents mentioned "MEIER'S" or any variant thereof. However, 121 respondents, or 35.6%, mentioned that the bottle said "Meyer Vineyard" or some variant thereof.

**Q. 7: First, can you describe what you saw?**

Mentioned "MEYER"	Frequency	Percent
Yes	121	35.6%
No	219	64.4%

There were significantly more mentions of physical features of the bottle. For instance, 232 of the respondents, or 68.2%, specifically mentioned that the bottle was "black" or "dark" in color.

Mentioned "black" or "dark" bottle	Frequency	Percent
Yes	232	68.2%
No	108	31.8%

Similarly, 133 respondents, or 39.1%, spontaneously referred to the "gold" lettering or writing on the bottle.

Mentioned "gold" lettering	Frequency	Percent
Yes	133	39.1%
No	207	60.9%

These responses indicate that significant proportions of the consumers surveyed were attentive to various features of the physical appearance and impression of the stimulus (in addition to the figures reported above, 17 respondents, or 5%, remarked that the bottle was "heavy"). For the purpose of this survey, of course, the most significant of these features is the name of the wine, which was recalled accurately without assistance by 35.6% of the respondents.

#### Question 8: Source confusion

Question 8 asks respondents to say, after the wine has been replaced behind its screen, who puts out the wine they just saw. For purposes of analysis and reporting, responses were coded as indicating Meyer Vineyard, Meier's, or Meier's Wine Cellars, references to "Napa Valley," other geographic references, other references, and "don't know" responses.

#### **Q. 8: Who do you think puts out the wine you just saw?**

Response	Frequency	Percent
Meyer	164	48.2%
Meier's	0	0%
Napa Valley	40	11.8%
Other geographical reference	16	4.7%
Other response	18	5.3%
Don't know	102	30%



As the table above shows, 48.2% of respondents, or 164, correctly identified Meyer as the source of the wine.

This figure has a sampling error of plus or minus 5.3 percentage points at the 95% confidence level. Technically, this means that if 100 random samples of consumers were drawn, in 95 of them between 44.9% (48.2% minus 5.3%) and 53.5% (48.2% plus 5.3%) of respondents would answer "Meyer" to this question.

An additional 11.8% did not name Meyer, but named "Napa Valley" (which, in fact, is the geographical source of the wine and is included in the name of the wine on the bottle). Slightly less than 5% answered with a different geographical reference, for example "California." Thirty percent of respondents could not recall or had "no idea" (as some of them said) who put out the wine.

Most striking, however, is that none of the respondents said that "Meier's" was the source of the wine. In other words, there was zero source confusion as measured by this question.

#### Question 9a - 9c: Source confusion

Questions 9a through 9c attempt to get at source confusion by a more indirect route, namely, asking respondents what other products, if any, are put out by the company that makes the product they just saw. Such an approach is necessary when, as with many products, it is not reasonable to expect consumers to know the name of the company that produces a product or is the owner of a brand. Often, consumers themselves are also aware of this, and they are better able to identify a product's source by giving other examples of the source's products.

**Q. 9a: Do you think that the company that puts out the wine you saw also puts out any other wines or other products?**

Response	Frequency	Percent
Yes	233	68.7%
No	23	6.8%
Don't know	83	24.5%

Here, approximately 69% of respondents said that they thought that the company that puts out the wine they saw also puts out "other wines or other products." The phrase "other products" was included in the question so that respondents would not feel that they could not name such products as sparkling juices, which are among Petitioner's products. *In other words, this question was intentionally worded so as to maximize the likelihood that respondents would reveal any confusion that existed between Registrant's wine and any of Petitioner's products.*

**Questions 9b and 9c**

If the respondent said "Yes" to Question 9a, they were asked to say what other products the company also put out. As can be imagined, respondents gave a very wide variety of answers to this question. The vast majority of respondents mentioned either "wine" or particular varieties of wine, for example "Chardonnay," "merlot," and "Champagne."<sup>4</sup>

**Q. 9b: What other products does the company that puts out the wine you saw also put out?**

If the respondent's answer to Question 9b included the phrase "other wines" without being more specific, they were asked Question 9c:

**Q. 9c: What other wines are you referring to?**

Again, the majority of respondents answered by naming a specific variety of wine. One difficulty in interpreting the responses to Questions 9b and 9c is that it is likely that at

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<sup>4</sup> A table with the transcribed responses to these two questions is appended to this report as Exhibit 4. A total of 247 respondents gave a response to 9b, 9c or both.

least some respondents did not have a specific, positive belief that the maker of the wine they saw also put out other products. Rather, the likelihood is that a significant number of them simply assume that a company that makes one wine probably makes others, and they then name other varieties of wine that they know about. This kind of response is reflected in the answers of a number of respondents, for example:

"Just different varieties of wines."

"I think they put out all other wines."

"I would assume that they would also make a [Chardonnay], [Merlot] and [Shiraz]."

Despite this, in examining the responses to Questions 9b and 9c for evidence of source confusion, I assumed that responses were considered and deliberate, and not mere guesses.

In coding the responses to Questions 9b and 9c, a response was counted as evidence of source confusion if it contained any reference to products that were more specific to Meier's than to winemakers in general. So, for instance, references to "juice," "grapes," "sangria," and "wine coolers" were counted as instances of confusion, while "cheese," "beer" and "bar utensils" were not. (To the best of my knowledge, Meier's does not make or sell wine coolers, but references to them were included on the assumption that the respondent may have been thinking of sparkling juice, which is among Meier's products.)

Based on this coding, I obtained the following tabulation of the results of 9b and 9c:

Response	Frequency	%
"Wine coolers"	15	4.4%
"Sangria"	4	1.2%
"Fruit juices"/"fruits"/specific fruits	6	1.8%
<b>Total</b>	<b>25</b>	<b>7.4%</b>

The total number of respondents revealing potential confusion as measured by these two questions, then, is 25, or 7.4%. This proportion is obtained by dividing the number of responses potentially indicative of confusion by 340, the total number of respondents in the survey. The sampling error associated with this proportion is 2.8 percentage points, which, as discussed earlier, means that if the survey were to be repeated with different samples 100 times, in 95 of those surveys the proportion of respondents who offer an answer indicative of confusion would be between 4.6% and 10.2%.

It is important to note that this type of response is the weakest indicator of confusion of all of the questions in this survey, in that respondents did not name Meier's or even any product that is uniquely associated with it. Rather, they mentioned product categories, such as "wine coolers," "sangria" and "fruit juices."

Question 10: Association confusion

**Q. 10a: Do you think that the company that makes the wine you just saw is associated or affiliated with any other company?**

Response	Frequency	Percent
Yes	49	14.5%
No	124	36.8%
Don't know	163	48.4%

The final question was designed to assess respondents' confusion, if any, as to association between Registrant and Petitioner.

Those answering "Yes" to Question 10a were asked what other company they had in mind. Responses are summarized in the table on the next page.

**Q. 10b: What other company is that?**

<b>Response</b>	<b>Frequency</b>	<b>Percent</b>
<i>No response</i>	295	86.8%
<i>Don't know</i>	25	7.5%
Thought it might be confused with another company that is Ohio based but spell it [Meijer's] (Interviewer: What do you mean 'it'?) The other company.	1	0.3%
[charbonet]	1	0.3%
[Daegio or Constellation brands]	1	0.3%
[merlot] bottle makes me think of it or [pinot]	1	0.3%
[Napa Valley] wines	1	0.3%
[Napa] Wineries California	1	0.3%
[Nappa Valley]	1	0.3%
[New England] and [Napa Valley] [California]	1	0.3%
[Yellow Tail]	1	0.3%
Any company related to wine. Spain peninsula.	1	0.3%
Gallow, Mondovy	1	0.3%
I'm not sure, I don't know, maybe hotdogs	1	0.3%
I'm sure some kind of beverage distributing company.	1	0.3%
I've heard of them and they're a big company so I guess.	1	0.3%
Italian Wine	1	0.3%
Lets see here, I want to say Seagram's.	1	0.3%
Merlot	1	0.3%
Meyer	1	0.3%
Producers/ grower of grapes, beverage company etc.	1	0.3%
Tobacco industry	1	0.3%
<b>Total</b>	<b>340</b>	<b>100%</b>

As the table reflects, twenty respondents gave an answer to this question that can be construed as substantive. Of these, seven ("Meijer's," "Daegio or Constellation brands,"<sup>5</sup> "Yellow Tail," "Gallow" [sic<sup>6</sup>], "Mondovy" [sic<sup>7</sup>], "Seagram's," and "Meyer") are recognizable as makers or distributors of wines.

Importantly, one of the responses to this question clearly refers to the Petitioner (though the name is slightly misspelled): "Thought it might be confused with another company

<sup>5</sup> Clearly a reference to *Diageo* and *Constellation* brands.

<sup>6</sup> Clearly a reference to *Gallo*, i.e. E. & J. Gallo Winery.

<sup>7</sup> Clearly a reference to *Mondavi*, i.e. Robert Mondavi Winery.

that is Ohio based but spell it [Meijer's] (Interviewer: What do you mean 'it'?) The other company." However, rather than indicating confusion between the two marks, the response clearly shows that the respondent is distinguishing between them.

In summary, the likelihood of confusion as to association, as measured by responses to this question, is zero percent (0%).

#### IV. CONCLUSION

The foregoing results indicate that there is no significant likelihood that consumers who are exposed to the Registrant's mark, MEYER VINEYARD, will confuse Registrant's product with those of the Petitioner, MEIER'S or MEIER'S WINE CELLARS. The maximum rate of confusion can be summarized as follows:

Total Rate of Confusion

Type	Percent
Source - direct	0.0%
Source - indirect	7.4%
Association	0.0%
<b>Total</b>	<b>7.4%</b>

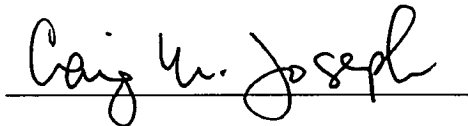
Again, 7.4% is the maximum rate of confusion of all types, using reasonable assumptions and construals of the meaning of consumers' responses to the survey questions. Moreover, as discussed previously, the "indirect" measure of the rate of source confusion is rather weak evidence of confusion, as respondents did not name Meier's or a product uniquely associated with Meier's.

## V. OPINION

Based on the findings discussed above, my opinion is that Registrant's use of the MEYER VINEYARD mark is not "likely to cause confusion, to cause mistake, or to deceive, to the damage and injury of Petitioner and the purchasing public."

I reserve the right to modify my opinion in the event that further facts come to my attention.

Respectfully submitted,

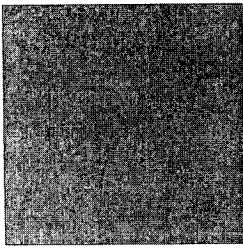
A handwritten signature in cursive script, reading "Craig M. Joseph", is written over a horizontal line.

Craig M. Joseph, PhD  
September 19, 2006

## **Exhibits**

- Exhibit 1 Curriculum Vitae of Craig M. Joseph, PhD
- Exhibit 2 Documents reviewed
- Exhibit 3 Survey questionnaire
- Exhibit 4 Responses to Questions 9b and 9c





## Craig M. Joseph, PhD

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Dr. Craig Joseph is a Director in FTI's Forensic and Litigation Consulting practice and is based in Chicago. Dr. Joseph has more than 10 years of experience conducting social science research in academic, public policy, business and litigation settings. His primary areas of expertise are the design and analysis of research to assess juror decision-making in complex civil litigation, the development of trial communication strategy, and the use of survey research in trademark litigation. His services for clients include focus groups and mock trials, development of opening and closing statements, design of visual communication strategy, and technical and strategic support at trial.

Dr. Joseph has provided advice and assistance in a variety of areas including antitrust, securities fraud, trademark and patent infringement, personal injury, product liability, commercial contracts, employment, toxic torts, and medical malpractice.

Dr. Joseph has also consulted on cases in which survey evidence is required to assess likelihood of confusion, secondary meaning, trademark dilution, and other phenomena relevant to trademark infringement matters.

Finally, Dr. Joseph also has experience in using econometric and social science methods in matters pertaining to class certification, unpaid overtime, and other issues. He has designed questionnaires and critiqued opposing experts' methods and findings in these areas.

Among the clients Dr. Joseph has worked with are Bartlit Beck Herman Palenchar & Scott; Davis, Cedillo & Mendoza; Heller Ehrman White and McAuliffe; Katten Muchin Zavis Rosenman; Kirkland & Ellis; Mayer, Brown, Rowe & Maw; Neal, Gerber & Eisenberg; Holland and Knight; and Wilson, Sonsini, Goodrich and Rosati.

Prior to joining FTI in 2001, Dr. Joseph was a Project Director at Leo J. Shapiro Associates in Chicago, where he designed and conducted surveys to measure likelihood of confusion, trademark dilution, and related phenomena for trademark litigation, and also conducted mock jury studies. He has also been a consultant for Trial Consultants, Inc., where he designed and analyzed focus group studies and assisted clients with jury selection and voir dire.

In addition to his work for FTI, Dr. Joseph is also a Postdoctoral Research Associate at the University of Chicago, where he works on several ongoing studies. He has taught courses in psychology, decision-making, research methodology and psychology and law at the University of Chicago, DePaul University, the University of Illinois at Chicago, and the City Colleges of Chicago.

Dr. Joseph holds a Ph.D. in Psychology and Human Development and a B.A. in Political Science from the University of Chicago. He is a member of the American Psychological Association, the American Psychological Society, the American Sociological Association, and the American Association for Public Opinion Research.



[www.fticonsulting.com](http://www.fticonsulting.com)

Exhibit I

**Cases in Which Dr. Joseph Has Offered Expert Opinion and/or Testimony**

*Neopost Industrie B.V., Neopost, Inc., Neopost S.A., and Hasler, Inc. v. PFE International, Inc. and PFE International Limited* (U.S. District Court, Northern District of Illinois). Expert report (trademark survey), deposition testimony.

*City of Chicago v. Milwaukee County* (Trademark Trial and Appeal Board, U.S. Patent and Trademark Office). Expert report (trademark survey – secondary meaning).

*The Tribune Company Holdings, Inc. and Media General Operations, Inc. v. Times Publishing Company* (U.S. District Court, Middle District of Florida). Expert report (likelihood of confusion survey), deposition testimony.

*Meier's Wine Cellars, Inc. v. Meyer Intellectual Properties Limited* (currently before Trademark Trial and Appeal Board, U.S. Patent and Trademark Office). Expert report (likelihood of confusion survey).

*Mike Rutti, et al. v. Lojack* (currently in U.S. District Court, Central District of California). Expert report on a survey in an employment class action matter.

## **Documents Reviewed**

Petitioner's First Amended Petition to Cancel

Petitioner's Motion for Summary Judgment and Memorandum in Support Thereof

Registrant, Meyer Intellectual Properties Limited, Answers to Petitioner's First Set of Interrogatories to Registrant

Declaration of Diane M. Jacquinot, with Exhibits

Photocopies of 3 Meyer Vineyard labels, one with Bates Number MEYER 0003

Eleven-page e-mail string concerning areas where Meier's products are sold

Color photocopies of Meier's print advertisements, Bates Numbers PMTZ-00942, 00943, 00952 through 00955, 00960, 001163, 001164

Document entitled "MEIER'S WINE CELLARS, INC. CUSTOMER LISTING, PERMANENT CUSTOMERS ONLY," Bates Numbers PMTZ-00884 through PMTZ-00915

Exhibit 2

## Consumer Survey

Start time: \_\_\_\_\_

### APPROACH RESPONDENT. SAY:

"Hi, I'm with \_\_\_\_\_. We are doing a very short survey of consumers in this mall and would like you to participate. The study takes about five minutes to complete, and does not involve any kind of selling. If you qualify and take part in the study, we will give you five dollars as a thank-you. Are you interested in participating?"

### IF RESPONDENT IS WILLING, SAY:

"To see whether you qualify, I need to ask you a few questions."

1. First, what is your age? \_\_\_\_\_  
[IF LESS THAN 21, TERMINATE.]
2. Do you live in this area on a permanent basis? [IF NECESSARY, DEFINE 'AREA' AS WITHIN 100 MILES.]  
[ ] Yes  
[ ] No [TERMINATE]
3. In the past six months, have you purchased or subscribed to a magazine devoted to news or current events?  
[ ] Yes  
[ ] No
4. In the past six months, have you purchased a bottle of wine?  
[ ] Yes  
[ ] No [TERMINATE]
5. In the past six months, have you attended a major sporting event?  
[ ] Yes  
[ ] No

You do qualify for the next phase of our study. This part involves you looking at a product and answering just a few questions. It will take less than five minutes. Could you join me in our research office so that we can proceed?

### ESCORT RESPONDENT TO INTERVIEWING ROOM.

End time: \_\_\_\_\_

Start time: \_\_\_\_\_

**SEAT RESPONDENT AT TABLE FACING COVERED PRODUCT. SAY:**

"Now I am going to ask you to look at a product, and then I am going to ask you a few questions about it. There are no right or wrong answers to these questions, and there are no "trick" questions here. You may look at this bottle for up to thirty seconds. Please feel free to pick it up if you like."

**REMOVE COVER FROM PRODUCT DISPLAY. ALLOW RESPONDENT TO LOOK AT THE PRODUCT FOR UP TO THIRTY (30) SECONDS. RECORD WHETHER RESPONDENT PICKS UP BOTTLE OR NOT.**

6. Picked up bottle:        ☐ Yes                      ☐ No

**WHEN RESPONDENT INDICATES HE/SHE IS DONE LOOKING AT BOTTLE, REPLACE COVER. SAY TO RESPONDENT:**

"Now I am going to ask you a few questions about the bottle you just looked at. For all of the questions, it is perfectly all right to say that you don't know if you don't have a belief or opinion about the question."

7. First, can you describe what you saw? **RECORD VERBATIM. IF NECESSARY, ASK RESPONDENT TO SPEAK MORE SLOWLY OR REPEAT. ASK RESPONDENT TO SPELL ALL PROPER NAMES. PROBE ONCE: Anything else?**

8. Who do you think puts out the wine you just saw? **RECORD VERBATIM. IF NECESSARY, ASK RESPONDENT TO SPEAK MORE SLOWLY OR REPEAT. ASK RESPONDENT TO SPELL ALL PROPER NAMES.**
9. a. Do you think that the company that puts out the wine you saw also puts out any other wines or other products?  
[ ] Yes **ASK 9b.**  
[ ] No **SKIP 10.**  
[ ] Don't know **SKIP 10.**
- b. What other products does the company that puts out the wine you saw also put out? **RECORD VERBATIM. IF NECESSARY, ASK RESPONDENT TO SPEAK MORE SLOWLY OR REPEAT. ASK RESPONDENT TO SPELL ALL PROPER NAMES.** **PROBE ONCE:** Anything else?
- c. **[IF RESPONDENT SAYS "OTHER WINES" WITHOUT ELABORATING, ASK:]** What other wines are you referring to?
10. a. Do you think that the company that makes the wine you just saw is associated or affiliated with any other company?  
[ ] Yes **ASK 10b.**  
[ ] No **SKIP 11.**  
[ ] Don't know **SKIP 11.**
- b. What company is that? **RECORD VERBATIM. IF NECESSARY, ASK RESPONDENT TO SPEAK MORE SLOWLY OR REPEAT. ASK RESPONDENT TO SPELL ALL PROPER NAMES.**

"Now I have just a few questions for classification purposes only."

11. a. Please tell me what your current occupation is. **RECORD VERBATIM.**

b. **IF RETIRED OR UNEMPLOYED, ASK:** What was your previous occupation?  
**ALL OTHER RESPONSES, SKIP TO 11.**

12. How would you describe your racial or ethnic background? **SHOW CARD 1.** Just tell me the letter on the card that corresponds to your background.

- ☐ A: Caucasian but not Hispanic
- ☐ B: Hispanic
- ☐ C: Black or African American
- ☐ D: American Indian or Alaska Native
- ☐ E: Asian
- ☐ F: Native Hawaiian or Other Pacific Islander
- ☐ G: Some other race:

If some other, ask: What other race? \_\_\_\_\_

- ☐ H: Two or more categories

13. By observation:

- ☐ Male
- ☐ Female

14. That is the end of our survey. My supervisor will validate some of the interviews that I have done today, so you may receive a very brief phone call confirming that you participated in this interview. May I have:

Your full name \_\_\_\_\_

Your phone number \_\_\_\_\_

Your zip code \_\_\_\_\_

**SAY TO RESPONDENT:**

"Thank you very much for participating in our study."

End time: \_\_\_\_\_

Total time: \_\_\_\_\_

Date: \_\_\_\_\_

Site Location:        1                      2                      3                      4

**SHOW RESPONDENT OUT OF THE INTERVIEWING AREA AND BACK TO THE MALL FLOOR.**

**TO BE COMPLETED BY INTERVIEWER:**

I hereby certify that I completed the above interview on the date and at the time indicated above, in accordance with the training I received on this project. I further certify that all responses marked above are true and accurate representations of the respondent's actual verbal responses to the questions in this questionnaire.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_



### Verbatim Responses to Questions 9b and 9c

ID#	Q9b Other products Verbatim	Q9c Other Wines Verbatim
1-003	It makes Sanghria too. n/e No	
1-004	Chardonnay, maybe merlow. n/e No	
1-007	Makes a variety of wines. a/e n/e	[cabernet]
1-010	I have no idea. (n/e)	[White blush] (n/e) No
1-012	Different flavor of wine and beverages the way it was bottled and packaged distinctly. a/e the nature of the business.	
1-013	Other wines all wineries carry different flavors of wine. [merlot, chardina, pinot nior]	[merlot, chardina, pinot nior]
1-014	Wine tools, glasses, verities, gourmet food	
1-015	Other wines, because he has seen wines that resemble this wine, [zinfindal, chardoney], and red wine.	[zinfindal, chardoney]
1-016	Other wine I'm taking a guess, I think they put out wine flavors like [blush, red zindfindel]	[red zinfindel]
1-017	[champagne] w/e non-alcoholic w/e n/e	
1-018	I think they put out all other wines. n/e n/o	Not sure.
1-019	Just different varieties of wines. n/e No	Don't recall names.
1-020	It puts out other wines and wine coolers. n/e No	Not sure.
1-021	Other wines, the way it was packaged, looked like a specialty wine product. [merlot, cabernet]	[merlot, cabernet]
1-025	Different wines. n/e No	[White zinfindel] n/e No
1-027	Wine coolers. n/e No	
1-028	Probably other white and red wines of different ages.	[chardonay] etc. n/e No
1-030	Put out white wines also [merlot] and other red wines.	red wines
1-031	Other types of wines. n/e/ No	Don't remember names.
1-033	I saw a white or red wine by the same company [Meyers]	
1-035	The company makes other wines. Also makes some cheeses. n/e No	Not sure of names
1-036	Other flavors of wine. (a/e) No	[Merlot] [Chardonnay, white] [Pinot Noir] [Pinot Griggio] [Shiraz]
1-037	Probably other wines, cork screws, wine coolers (a/e) accessories for wine drinking, maybe cheese	White wines [Merlot] [Shiraz]
1-038	Probably a [Merlot] [Chardonnay] maybe a [Shriaz]	[Merlot] [Chardonnay] and maybe a [Shiraz], but I really don't know
1-039	[Pink charlis] [with zinfendel]	
1-040	Fruits, grapes or something	n/a
1-041	No other products other than wine	Different types of [Cabernets] maybe some light wines
1-042	Crackers, cheese, something else edible	Don't know
1-043	Probably other types of wines, blush, white wines	Blush, white [zinfindale]
1-044	[Chardonnay] and rose'	
1-046	Other wines and wine coolers w/e n/e	[Merlot] [Shriaz] [Cabernet] w/e n/e

EXHIBIT 4

### Verbatim Responses to Questions 9b and 9c

1-047	Other wines	[White zinfandale] [Merlot] etc.
1-048	Other wines and salad dressings w/e n/e	[pinot nior] w/e [pinot grigio]
1-049	Other types of wines, like [Merlote] etc. a/e [Chardonnay] w/e n/e	[Merlote] and or [Chardonnay]
1-051	Probably other types of wines w/e n/e	[pinot grigio] w/e n/e
1-052	Other kinds of wine w/e n/e	[Merlot] [Chardonnay] etc. w/e n/e
1-053	Different types of wines and different years w/e n/e	[pinot noir]
1-054	Don't know w/e n/e	
1-055	I don't know	
1-058	They make other wines w/e n/e	[Merlot] w/e [Cabernet] w/e n/e
1-061	Gallow wine. a/e I would think something of a lower end, not a higher end. a/e n/e	Gallow wines
1-062	I don't know	I would assume that they would also make a [Chardonnay], [Merlot] and [Shiraz]
1-063	Maybe fruit drinks.	Don't know. I think that they would have other flavors.
1-065	Different types of wine w/e n/e	[Merlot] w/e [pinot nior] w/e n/e
1-066	Other wine	merlot
1-073	Other types of wine w/e n/e	[pinot grigio] w/e [merlot] w/e [shiraz] w/e n/e
1-074	[Chardonnay] w/e [pinot nior] w/e n/e	
1-075	Other wines [shiraz] w/e [Chardonnay] w/e [pinot grigio] w/e n/e	
1-080	Different types of wine w/e [Merlot] [Ninot nior] w/e n/e	
1-084	[chardnay] w/e [champagne]	
1-085	Other wines w/e n/e	[pinot nior]
1-086	Red wines and other wines w/e n/e	[merlot] [shiraz]
2-001	[shardonye] probably red or white wines [someigon]	red and white
2-003	[merlot] [chiraz]	[chiraz, cabernet]
2-004	Other flavors of wine, bottle openers	red wines, cooking wines, sparkling wines
2-005	They produce other kinds of wine, other alcoholic products, maybe produced e.g. wine coolers.	[Chardonnay] dessert wines, other variety white, rose and red wines.
2-007	Other wines, white, [chablis] a typical California wine	white wines, maybe a [zinfandel]
2-010	Other wines and hard liquor	Different types such as merlot
2-011	Other wines	[chardo]
2-013		[merlot,bergundies]
2-014	I don't know, but I like [Yellow Tail]	2
2-018	Champagne	Don't know, but [Napa Wineries] usually has more than one grape.
2-019		
2-020	I assume so, because very seldom does a company put out a [cabernet]	[Vampyre]
2-022	Other varieties of wine	[Pinot] [Chardonnay] [Reshiny] [bergundy]
2-024	wine	[merlot, schiraz]
2-025	Hard liquor or wine coolers	[cabert wine]
2-027	red and blush	[zinfandale]
2-028	White wines, different red wines in different bottles	[White Zinfindle]

### Verbatim Responses to Questions 9b and 9c

2-030	Whisky	Wines that are dry. French wine, but doesn't remember the name.
2-031	Different types of wines, sweet taste, white wine, champagne	[Yellow Tail] [Jubalani]
2-034	Different flavors of wine.	[chablis, cabernet, merlot]
2-035	Wine coolers, openers and other wines/wine products.	[cabernet sauvignos] [Bushley]
2-036	Wine cooler, sparkling wine	[Zindindale Bonsfones]
2-038	Wine coolers	Sparkling wines and clear.
2-039	Other wines, maybe champagnes	[white zinfandel] [merlot]
2-040		[Columbia Crest] [Estancia] [Sutter Home] [Robert Mondovi]
2-041	[other wines]	[merlot, zinfandel]
2-042	I don't know	I don't know
2-043	Other wine product other red wine maybe a [Merlot]	[Merlot]
2-044	Wine chillers, merchandise, cabinets, cork openers, cheese	[merlot] [Pingot Noyr]
2-046	Other wines, wine coolers	[linagore Winery] local
2-047	Other wines, produce like grapes, liquors	[white zinfandel] [Paul Mason] [Sutton Holmes]
2-048	Other types of wine, red wines	[blanc]
2-051	Probably other wines, but can't name any of them.	
2-051-2	Other wines such as red wine, etc. and wine products nice openers and coolers	[Chardonnay]
2-052	Not sure on specific names	
2-054	Other wines	[chablas] [zenfardal]
2-055	White wine, [point nora] white [zendifal]	[point nora] red wine white [zendifal] blush wine
2-056	No idea.	Does not resemble anything bought recently and is not a wine connoisseur.
2-057	Not sure of specific names.	
2-058	Other wine	[shadonay, merlot, shiraz]
2-059	Think they put out a lot of wines as the bottle says [Napa Valley]	
2-062	[Bacardi wine]	Advertisement on TV similar to the one seen.
2-063	Do not know, multiple wines, California, must put out a number of wines.	
2-064	Different types of wines/drinks	white wine, sweet wine.
2-066	They make other types of wine.	They probably make white wines and other types of reds.
2-067	Wine "designer" wines, (newness reminds him of a non-cabernet wine)	Freshonet, dark glass, [Curbet Canyon]
2-068	Never seen a bottle like that.	
2-069	May put out a zinfandel or a white wine total winery with that produces no other products.	A zinfandel or a white, anything other than a [sauvignon].
2-070	They are in [Nappa Valley] so they do.	Merlo, pinos, Rose', cabernets
2-071	white wine	White zinfandel
2-072	Yes, I do not recall, but they may do formal wines.	[Brut/Moet] chadonnay [zinfandel] [Bacardi wine]
2-073	May put out additional wines.	I don't have any specific kind may have a number of different types.

### Verbatim Responses to Questions 9b and 9c

2-074	Don't know. Assumes just puts out other wine.	red, white wine, wine coolers.
2-075	Maybe some other drinks besides wine.	
2-076	champagne	white wine
2-077	Does not know.	
2-078	Pinot wines	
2-079	None	
2-080	Probably white wine, zindandel, cabernet different grapes, only wine.	
2-081	Other type of wines	Don't know
2-082	More wine, maybe a few knick knacks, gift sets, glasses of wine.	They probably make merlot, white wines [chardonnay, chablis] [sauvignon blanche].
2-083	Don't know for sure, it looks like a dark wine, but I figure they make other wines such as light, white and rose.	Light, white and rose.
2-084		sparkling wines, champagne
2-085	[Mad dog 20/20] white wine [Irish Rose]	
2-086	Blush or white.	[Burdney] [chardonney] [pinot gergio]
2-087	I do not recognize the name, doesn't remember.	
2-088	I don't know.	
2-089	I have seen a bottle similar to this, an American brand (other Nappa Valley)	
2-090	Other wines.	Don't know, but red and white.
2-092	[merlot] I think only wine.	[Merlot]
2-094	I don't know.	
3-001	A [Zinfandel] wine. (a/e) champagne	
3-003	Merlot (a/e) zindandel and pinot noirs	
3-004	Champagne (a/e) No	
3-005	I would assume white wines too. (a/e) Maybe some [merlots] too and other wines.	[Sangria] and red table wine.
3-006	White zinfadel, (a/e) other wines	Rose wine
3-008	White wine (a/e) That's all	
3-009	merlot, pinor noir (a/e) No	Zin
3-011	Pinot Noir, merlot	just wine
3-012	Maybe tobacco. (a/e) Maybe grapes	
3-013	[zindfuldel] (a/e) that's all	[Sangria]
3-014	Other wines or beer. Maybe mixers. (a/e) No	Not sure, but recognize the name brand.
3-015	Other wines (a/e) No	Different varieties
3-016	Other wines (a/e) No	Different wines, red, white, zinfedel
3-018	Other wine products but I am not sure which ones. (a/e) No	I have no clue
3-018-2	Different types of wine like [White Zinfandel] and other red wines. (w/e) Nothing	
3-021	[zinfandel] (a/e) rose, [Blush] and white wines	
3-023	[Merlot] (a/e) red wines & other wines.	White wines
3-024	[Gallo] (a/e) [French or Italian] and [California] [Texas] wine. Other wines.	Imports and [Chile] [Peru] wines.
3-025	Miro's a/s that's it-other wines	Mirlos, chardneae
3-026	Other wines a/e That's it	Chardine, Merlo
3-029	More wine, different types a/e nothing	Sangria
3-031	Other wines	White wine, pink wine, rose
3-032-2	Other types of wine a/e nothing	pino, chardonnay, that's it

### Verbatim Responses to Questions 9b and 9c

3-033	I do not know	
3-035	None that I have seen a/e that's it	
3-036	I do not remember, saw the name before or a fruit juice of different types	
3-038	I do not know	
3-040	That I don't know	
3-042	I have no idea	
3-044	white wine a/e No	
3-045	White wine a/e nothing	
3-046	I do not know	
3-047	Other wines	Maybe red or white wine, [Napa Valley] California wine
3-048	Merlo, white zinfenidal a/e port	
3-049	Other types of wine a/e none	Reislings, other wines
3-050	They could put out various other alcohols like vodkas or whiskeys or different types of alcohols a/e that's all I can think of	
3-051	White merlot a/e char.	
3-052	Just wine I guess	Napa Valley wines
3-053	Merlot, a/e tobacco, white	
3-054	I do not know	
3-055	I have no idea	
3-057	Probably other kinds of wine	Merlot w/e that's all I can think of
3-058	Merlot a/e red	
3-060	zin-, merlot a/e white wine	
3-061	Merlot a/e Cali	
3-062	Merlot, red a/e white	
3-063	Red, cheese a/e white	
3-064	Different wines, a/e Merlot	Merlot, Pinio girieo
3-065	Red, a/e white	
3-066	White zin-, a/e merlot	
3-067	Merlot, a/e white, cheese	
3-068	Not sure, a/e other wines	White zanidefall, merlot
3-069	Merlot, a/e blush white	
3-070	Red, a/e white	
3-071	Wines a/e No	Don't know
3-072	Merlot a/e zin red	
3-073	Merlot a/e No	Red
3-075	Cheese a/e No	
3-076	Blush a/e merlot white	
3-077	Merlot, a/e zin. Other wines	Reds
3-078	I am not sure a/e I can't think of anything right now	
3-080	Cheese a/e Merlot, white	
4-001	No idea (a/e) no	
4-002	I don't know. (a/e) No	
4-003	I wouldn't have any idea. (a/e) No	
4-004	Probably different kinds of wines (a/e/) No	Let's see here, maybe like white or sweet.
4-005	Different types of wine.	Merlot, probably a chardonnay.
4-006	I would say they put out different kinds of wine. (a/e) I wouldn't say that's all they put out, but I'm not sure.	White wines, red wines, rosa or champagne.

### Verbatim Responses to Questions 9b and 9c

4-008	I'd say different varieties of wine. (a/e) No, I wouldn't have a clue to what they put out.	[Pinot Noir] [Zin Findal]
4-009	Other wines (w/m other wines) a chardonney, white zin, probably a merlot (a/e) that's it.	
4-010	Other types of wine.	Might have white zinfandel, Riesling and that's all I can think of right now.
4-012	Maybe like wine coolers (a/e) No	
4-013	Other wines (a/e) No	Chardonnay, Chablis, probably a merlot and possibly a zinfandel.
4-015	Not sure, I just know it's familiar. (w/m familiar) the name [Meyer]. I believe I have seen it in the grocery store, I'm not positive, (w/m it) the brand [Meyer] in the wine section & other places too. Just can't put my finger on it.	
4-017	I would not have a clue.	
4-018	Juice. (w/m) grape. (a/e) apple (n/e)	
4-019	Other types of wines. I know they have some white wines. (w/m they) The company. I can't pronounce the pinot noir, it's not pronounced the way it looks. (w/m it) Pinot Noir. They also have some other red wines. (w/m it) the company. Like merlot. I think that's how it is spelled. (w/m it) Merlot.	Reds, whites, that's probably about it, (w/m it) the wines.
4-020	I don't know. I think it probably puts out different kinds of wine (w/m it) the company.	Chablis, chardonnay. I think the bottle said merlot, but I'm not sure.
4-021	Champagne, other wines (a/e n/e)	Rose, pinot grigio. Red, burgundy, chardonnay. (a/e n/e)
4-023	Just other wines-champagnes (a/e) No	That would be the white zinfandel
4-024	Other wines (a/e) No	Rose, white zinfandel, that's all I can think of now.
4-027	Other wines (a/e) No	Other reds and other white wines
4-028	Other wines (a/e) No	Various white and red wines.
4-029	They probably put out other alcoholic beverages. (a/e) No	
4-030	Vin Rose' (a/e) other wines.	White zinfandel
4-032	I have no idea.	
4-033	Probably alcoholic beverages. (a/e) No	
4-034	More wine, couldn't say for sure, but my best guess would be that if you make one type of wine, you probably make several.	Different flavored wines, I can't say for sure what flavors, but usually use one kind of grape you get several flavors out of it mixing other types of grapes to produce various wine textures.
4-035	Probably other types of wines a/e No	Merlot, maybe cabernet
4-036	Don't know a/e No	
4-037	I don't know	
4-038	Too many to list a/e that's about it	I know they do merlot and Rose'. I know they do a red and white wine.
4-039	Different types of wines. a/e Possibly different type of bar utensils.	Well, other like red and white wines. Maybe zinfandel.
4-040	Other wines a/e nope	Probably do white wine and rose'

### Verbatim Responses to Questions 9b and 9c

4-041	Maybe Asit Spumante and looks like it would be California type wine for Ohio doesn't look like that. The packaging for Ohio wines isn't as fancy, cheaper, inexpensive wine.	
4-043	I would say other kinds of wines a/e No	Chardonnay
4-045	Other wines a/e no	Other flavors, like merlot, zinfandel, chablis
4-046	I'm not sure. a/e No	
4-048	I would assume they make more than one wine. They wouldn't stay afloat with just one wine. Probably have a merlot or a port, I don't know. a/e no I quit while I'm ahead.	Merlot, port
4-049	Considering they have a cabernet sauvignon, they would put out others maybe a riesling, merlot a/e that's it for right now.	Riesling, merlot
4-051	I don't know	
4-052	Other products maybe just wine, maybe champagne a/e no	I don't know
4-053	Maybe grape juice a/e I imagine other wines	I imagine red wine, zinfandel, white wines
4-054	I don't know	
4-055	I believe other wines a/e none that I'm aware of	I believe they have other varieties of wine like for example chardonnays
4-056	I would say Lambrusco a/e No	
4-057	Probably a white wine, probably a red white, a/e and maybe some glasses with their logo on it (w/m it) the glasses.	I don't know
4-058	Probably Jellies or something like that. a/e preserves.	
4-060	Well, probably Chablis a/e that's all I can think of right now.	
4-062	I'm sure different types of wine, different flavors, probably different red wines, being that it's from [Nappa Valley] probably holiday white wines, there's a possibility. a/e No, not at all.	Like a Blanc, I wouldn't know.
4-063	I don't know a/e No	
4-064	They make several different wines, they would make a (for me I don't like it) it's a French name, a little too dry, but it's a white wine Chablis maybe. a/e I can't think of the other one.	
4-067	I have no idea. I'm just guessing they put out different kinds of wines. a/e No	Um, like a pinot noir or sometimes different types of wines.
4-068	Maybe, beer. a/e No	
4-070	Probably wine coolers. a/e and grape juice.	
4-072	I would say, different types of wine. a/e No	I'm not a wine person, other brands other flavor, so to speak. If it was beer, it would be easier for me. White, red, my wife is more of the wine person, Riesling.
4-073	Maybe cheeses a/e No	
4-074	Other types of wine a/e not that I can think of.	Burgundy, zinfandel
4-075	Wine related utensils a/e No.	
4-076	Different types of wines a/e I don't know of anything else.	Different blends, different age, different grapes.

### Verbatim Responses to Questions 9b and 9c

4-077	Some kind of Champagne, wine cooler and some boxed wine even. a/e No.	
4-078	I guess it's from [Napa Valley]. I've heard of them before. Probably other types of wine. a/e No	Different kinds of white wine or other kinds of red wines.
4-080	Well, other types of wine. I think they do like those wine coolers. I think I'm not sure. a/e No	Well, there are different kinds. I mean like they do Chardonnay and they do a cabernet sauvignon, different styles of wine.
4-081	Maybe different types of wine or different types of alcohol a/e maybe some kind of fruit juice or something like that.	Pinot grigio, champagne, merlot and some kind of white wine.
4-082	Other wines, other flavored wines I should say. a/e No	Well, that was a chardonnay correct? It would be along the same lines as the chardonnay.



**CERTIFICATE OF MAILING**

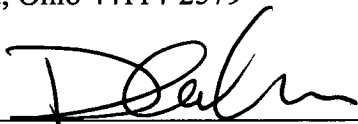
I hereby certify that this **REGISTRANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to: Attention: TTAB, Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on June 1, 2007.

By:   
Debra DeLaCruz

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **REGISTRANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** was served by first class mail, postage prepaid, on June 1, 2007, upon the following attorneys for Registrant:

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